Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of *Koon v. United States*

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The Supreme Court held in Koon v. United States *that a sentencing judge's decision to depart from the sentencing range authorized by the United States Sentencing Guidelines shall be reviewed under an abuse of discretion standard. Professor Johnson argues that, to the extent the Court's opinion is interpreted to require extremely deferential review of a sentencing judge's decision to depart, it contradicts the role of appellate review envisioned by Congress in the Sentencing Reform Act, undermining the ability of appellate courts to engage in the crucial law declaration and discretion control functions that Congress intended. However, the abuse of discretion standard is sufficiently malleable to permit the courts of appeals to remain faithful to the views of Congress as well as fulfill their institutional role by closely examining the legal components of a sentencing judge's decision to depart.*

"The distinguishing feature of our criminal justice system is its insistence on principled, accountable decisionmaking in individual cases."[1]

"Today's message for sentencing judges is: Depart! Depart! Depart! Departures are the lifeblood of the sentencing guidelines process."[2]

In *Koon v. United States*,[3] the Supreme Court addressed for the first time the proper standard of appellate review to be applied to a sentencing judge's decision to impose a sentence outside the range of sentences permitted by the United States Sentencing Guidelines ("Guidelines"). The Court held unanimously that such departures from the Guidelines are to be reviewed under the "abuse of discretion" standard.[4] Both the Court's choice of the abuse of discretion label and certain language in its opinion which emphasized the discretion retained by the sentencing judge under the Guidelines system suggest that *Koon* represents rejection of the appellate courts' prevailing approach to

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[1] Maryland v. Wilson, 117 S. Ct. 882, 890 (1997) (Kennedy, J., dissenting).

[2] *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2070 (1992) (remarks of Judge Vincent L. Broderick).

[3] 116 S. Ct. 2035 (1996).

[4] *Id.* at 2047–48.

departure review,[5] in favor of a dramatically more deferential process.[6] This Article contends that to the extent *Koon* is so interpreted, it is fundamentally inconsistent with the roles of departure and appellate review envisioned by Congress in creating the Guidelines system. The Court's suggestions to the contrary represent a flawed conception of federal Guidelines sentencing.

However, the departure review standard adopted in *Koon* may not be as deferential as it may appear at first blush. The inherent malleability of the abuse of discretion standard, and the lack of consistency in the *Koon* Court's own application of the standard, both suggest that *Koon* permits appellate courts to continue to analyze closely the propriety of sentencing judges' articulated grounds for departure in most circumstances. Indeed, the emerging appellate case law applying *Koon* suggests that some courts of appeals appreciate this, although there is no consensus regarding the impact of *Koon* on the task of appellate departure review.

This Article represents both a critique of the Court's analysis in *Koon*, and an attempt to articulate a workable approach to departure review, given the constraints imposed by that case. Part I provides background on the central issues arising in *Koon*: first, the proper roles of departure and appellate review in the Guidelines scheme, and second, the jurisprudence of standards of review.

Part II analyzes the Court's reasoning in *Koon*, describing the Court's theory of the proper functions of departure and appellate review in light of its analysis of the language and legislative history of the Sentencing Reform Act, as well as the Court's views about the institutional roles of district and appellate courts in deciding mixed questions of fact and law. Part II also examines whether abuse of discretion is a dramatically more deferential standard of review than was the approach prevailing before *Koon*, and concludes that the Court was not entirely clear on this point.

Part III critiques the Court's reasoning in *Koon*, challenging both the evidence cited by the Court in support of its apparent conclusion that deferential review of departure decisions is consistent with Congress's stated intent, and the Court's application of its clearly distinguishable civil sanctions standards of review jurisprudence to the departure review issue presented in *Koon*. Part III also suggests that the Court's analysis is permeated by a flawed conception of the Guidelines, and presents an alternative vision of the Guidelines which highlights the potential damage to Congress's vision of sentencing reform caused by excessively deferential review.

Part IV briefly examines contrasting appellate approaches to implementing *Koon*, and urges the courts of appeals to take seriously their role in the

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[5] *See infra* notes 62–65 and accompanying text.

[6] See *infra* notes 259–70 and accompanying text for examples of appellate courts employing a highly deferential approach to departure review as a result of *Koon*.

Guidelines departure scheme by examining closely the legal components of the "discretionary" decision to depart.

I. BACKGROUND

A. *The Roles of Departure and Appellate Review in the Guidelines Scheme*

1. *Departure and the Guidelines*

A complete description of the origins and function of the United States Sentencing Guidelines is beyond the scope of this Article.[7] However, some background is essential to understanding what was at stake in *Koon*.

Prior to adoption of the Guidelines system, federal judges possessed extremely broad discretion in imposing sentences.[8] Constrained only by relatively broad, legislatively prescribed minimum and maximum sentences,[9] each judge was free to pursue her own preferred sentencing goals in individual cases.[10] Because individual judges held divergent views about proper sentencing considerations,[11] disparities in treatment of similarly situated offend-

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[7] For an excellent discussion of the background and legislative history of the Sentencing Reform Act, see Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

[8] *See id.* at 225-26.

[9] *See, e.g.*, Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 682 (characterizing pre-Guidelines judicial sentencing discretion as "virtually unlimited").

[10] *See* S. REP. NO. 98-225, at 41 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224 (noting lack of "comprehensive Federal sentencing law" to guide judges about appropriate purposes of sentencing). This Senate Report is the principal legislative history of the Sentencing Reform Act.

[11] According to the Senate Report:

> A recent study indicates that Federal judges disagree considerably about the purposes of sentencing. While one-fourth of the judges thought rehabilitation was an extremely important goal of sentencing, 19 percent thought it was no more than "slightly" important; conversely, about 25 percent thought "just deserts" was a very important or extremely important purpose of sentencing, while 45 percent thought it was only slightly important or not important at all.

Id. at 41 n.18.

ers resulted.[12]

Increasing discontent about the perceived arbitrariness of this discretionary sentencing regime eventually prompted a legislative response.[13] After a series of fits and starts, this sentencing reform movement culminated in Congress's 1984 passage of the Sentencing Reform Act ("SRA").[14] The legislative history of the SRA is clear: reduction in unwarranted sentencing disparity was "the major premise of" this sentencing reform bill.[15] To promote greater consistency in sentencing, the SRA created the United States Sentencing Commission, and authorized the Commission to promulgate sentencing guidelines. Consistent with Congress's diagnosis of the problem—too much judicial discretion resulting in unwarranted sentencing disparity—the guidelines system adopted in the SRA is characterized by narrow sentencing ranges[16] that generally are binding on sentencing judges.[17]

Congress recognized, however, that uniformity in sentencing could not be

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[12] *See id.* at 41–46 (citing research finding significant sentencing disparities in the federal courts), 53 n.72 ("Recent studies indicate that sentences too often reflect the personal attitudes and practices of individual sentencing judges."); *see also* Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299, 306–07 (1996) (collecting studies establishing existence of sentencing disparities under pre-Guidelines regime).

[13] *See* Stith & Koh, *supra* note 7, at 227–30 (describing the origins of congressional sentencing reform efforts).

[14] *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

[15] S. REP. NO. 98-225, at 78. Congress also was concerned about promoting "honesty" in sentencing. *See, e.g.*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 3 (1988). The principal means to this goal was the abolition of parole. *See* S. REP. NO. 98-225, at 56–58.

[16] See 28 U.S.C. § 994(b)(2) (1994), which provides:

> If a sentence specified by the guidelines includes a term of imprisonment, the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment.

Some commentators refer to this provision as the 25% rule. *See, e.g.*, Bowman, *supra* note 9, at 691.

[17] *See* 18 U.S.C. § 3553(b) (1994) (requiring sentencing judge to impose the sentence authorized by the Guidelines, except in certain limited circumstances). Congress considered, and rejected, an alternative proposal which would have created a system of non-binding, advisory guidelines. *See* S. REP. NO. 98-225, at 79 (explaining that Congress rejected an amendment to make the guidelines more voluntary); *see also* Stith & Koh, *supra* note 7, at 242–48 (describing evolution of Sentencing Reform Act from 1977 bill which would have permitted appellate reversal only of those departure sentences found to be "clearly unreasonable").

pursued to the complete exclusion of other considerations. It granted to judges the authority to "depart" from the Guidelines, in an effort to provide a safety valve for unusual cases. The relevant statutory provision, 18 U.S.C. § 3553(b), provides:

> The court shall impose a sentence of the kind, and within the range [supplied by the Guidelines] unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described [by the Guidelines].[18]

In this way, Congress sought to preserve some discretion for judges to impose sentences outside the Guidelines in unusual cases.

The legislative history of the SRA echoes the language of section 3553(b) in emphasizing the relatively narrow scope of departure under section 3553(b). Noting that "[a] primary goal of sentencing reform is the elimination of unwarranted sentencing disparity," a Senate Report states that "the bill seeks to assure that *most cases* will result in sentences within the guidelines range and that *sentences outside the guidelines will be imposed only in appropriate cases.*"[19]

The discretion of sentencing judges was further cabined by the SRA's requirement that any departure must be accompanied by a statement of reasons on the record justifying the departure.[20] The legislative history emphasizes the importance of the statement of reasons for departure sentences, both as a means to discourage sentencing judges from resorting to departures in inappropriate cases,[21] and as an aid to appellate review of departures.[22]

The Commission implemented the statutory departure directive through the general departure provisions of the Guidelines, which appear in sections 5K2.0 through 5K2.16 of the Guidelines Manual. Section 5K2.0 provides a general description of the Commission's view on the appropriate use of departures. It

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[18] 18 U.S.C. § 3553(b) (1994).

[19] S. REP. No. 98-225, at 52 (emphasis added).

[20] *See* 18 U.S.C. § 3553(c)(2) (1994) (stating that judges must provide "specific reason[s]" for a sentence that falls outside the range required by the Guidelines).

[21] *See* S. REP. No. 98-225, at 79 (explaining that the statement of reasons requirement would highlight situations in which a judge "would have no adequate justification for deviating from the recommended [sentencing] range," and this should be "sufficiently important to dissuade a judge from deviating from a clearly applicable guideline range"). *See generally* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657–58 (1995) (describing the "decision-disciplining function" of providing reasons for decisions).

[22] *See* S. REP. No. 98-225, at 80 (describing the statement of reasons as "especially important" for appellate review of sentences outside the applicable guidelines range).

tracks the general departure language Congress used in section 3553(b), providing that a sentencing court may depart from the sentencing range provided by the Guidelines "if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'"[23] In fleshing out the meaning of the departure provisions, the Commission characterized its view of the proper role of departures in the following manner:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.[24]

Because the Commission felt that it had accounted for most significant sentencing factors, it believed that courts rarely would need to depart.[25]

2. *Appellate Review and the Guidelines*

Prior to adoption of the Guidelines, criminal sentences were, for all practical purposes, unreviewable.[26] This feature of the sentencing landscape was often criticized by proponents of sentencing reform, who suggested that the absence of sentence review contributed significantly to the unpredictability and unfairness of the sentencing process.[27]

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[23] U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1997).

[24] *Id.* § 1A4.(b).

[25] *See id.* ("[T]he Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often . . . because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice.").

[26] *See, e.g.*, United States v. Tucker, 404 U.S. 443, 447 (1972) (stating that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review").

[27] *See, e.g.*, MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 84 (1973) (urging appellate review as part of an effort to counter "the capricious unruliness of sentencing"); PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM 60 (1977) ("The arguments in favor of sentence review, as propounded by scholars, legislators, and jurists, are overwhelming."); Robert J. Kutak & Michael Gottschalk, *In Search of a Rational Sentence: A Return to the Concept of Appellate Review*, 53 NEB. L. REV. 463, 510 (1974) ("The record of the irrational or disparate sentence is too well documented to be dismissed or put out of mind. . . . The

Sentencing reform advocates touted appellate review as an important ingredient in guidelines-based sentencing reform, advancing two major rationales. First, such review would aid in control of the exercise of discretion by sentencing judges.[28] Sentencing reformers viewed appellate review as essential to correct the inevitable mistakes and errors of judgment that would occur in implementing a new guidelines scheme.[29]

Second, and perhaps even more important, appellate review was conceived as a crucial mechanism for promoting consistency and fairness by aiding in the evolution of sentencing doctrine on which judges could rely when making sentencing decisions. As one prominent group of commentators explained: "[A]ppellate review, through articulation of legitimate reasons and standards for sentencing, is an ideally suited institutional mechanism to upgrade—through the gradual development of case law—the rationale and rationality of sentencing."[30]

Appellate review of sentencing decisions was both a major innovation and a central feature of the Sentencing Reform Act. The Act authorizes appeal of sentences by either the defendant or the government if the sentence imposed meets one of four criteria: (1) it was imposed "in violation of law"; (2) it was imposed "as a result of an incorrect application of the sentencing guidelines"; (3) it was outside the applicable Guidelines sentencing range; or (4) it was imposed for a sentence for which there was no applicable guideline and was plainly unreasonable.[31]

The scope of Guidelines sentence review under 18 U.S.C. § 3742 is limited. If the court of appeals concludes that the sentence was imposed in violation of law or as the result of an incorrect application of the Guidelines, it is required to remand the case to the district court for further proceedings.[32] Similarly, if the court concludes that the sentence is outside the applicable Guidelines sentencing range and is "unreasonable," it is required to set aside

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inquiry is not whether there should be a system of appellate review, but rather how that system should be established and what form it should take.").

[28] *See* O'DONNELL ET AL., *supra* note 27, at 60.

[29] *See id.* (noting that appellate review provides a mechanism to correct the "grossly excessive" sentences that are possible even under a guidelines system). *See generally* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 756-58 (1982) (describing purposes and benefits of appellate review).

[30] O'DONNELL ET AL., *supra* note 27, at 60; *see also* FRANKEL, *supra* note 27, at 84 ("One way to begin to temper the capricious unruliness of sentencing is to institute the right of appeal, *so that appellate courts may proceed in their accustomed fashion to make law for this grave subject.*") (emphasis added).

[31] 18 U.S.C. § 3742(a)–(b) (1994).

[32] *See id.* § 3742(f)(1).

the sentence and remand to the district court for further proceedings.[33] In all other circumstances, the appellate court is to affirm the sentence.[34] The SRA does not permit appellate review of a sentence within the Guidelines range.[35] Nor does it permit review of a sentencing judge's discretionary decision not to depart from the Guidelines range.[36]

These limitations on the scope of appellate review were designed to preserve some degree of autonomy for sentencing judges in implementing the Guidelines.[37] On the other hand, while Congress created a structure within which sentencing judges retained significant discretion, it simultaneously emphasized the importance of appellate review to limit that discretion, in order to help promote greater consistency in sentencing.[38]

3. *Intersection: Appellate Review of Departure Decisions*

Koon was not the first Supreme Court case to address appellate review of decisions to depart under the Guidelines. In *Williams v. United States*,[39] the Court granted certiorari to determine whether an appellate court could, based on its own assessment of the "reasonableness" of a departure sentence, affirm

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[33] *See id.* § 3742(f)(2). This section also provides that if there is no applicable guideline for the offense, the appellate court may set aside the sentence only if it is "plainly unreasonable." *Id.*

[34] *See id.* § 3742(f)(3).

[35] *See, e.g.*, United States v. Colon, 884 F.2d 1550, 1554–55 (2d Cir. 1989) (characterizing as "a conscious decision consistent with its overall purpose" Congress's refusal in § 3742 to provide for appellate review of a sentence that is within a correctly calculated guidelines range).

[36] *See, e.g.*, United States v. Morales, 898 F.2d 99, 101 (9th Cir. 1990) (following other circuits in holding that § 3742 "precludes appellate review of a district court's discretionary refusal to depart" from the sentencing range specified by the Guidelines). The courts carefully distinguish between such discretionary refusals to depart and a sentencing judge's erroneous determination that departure is not permitted under the circumstances of the case, which is reviewable as an incorrect application of the Guidelines. *See, e.g.*, United States v. Mummert, 34 F.3d 201, 205 (3d Cir. 1994); United States v. Gifford, 17 F.3d 462, 473 (1st Cir. 1994) ("[A]ppellate jurisdiction may attach if it appears that the failure to depart stemmed from the district court's mistaken impression that it lacked the legal authority to deviate from the guideline range . . . .").

[37] *See* S. REP. NO. 98-225, at 150 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3333.

[38] *See id.* (stating that appellate review was designed to guide and control sentencing judges' discretion in order to "promote fairness and rationality, and to reduce unwarranted disparity, in sentencing").

[39] 503 U.S. 193 (1992).

such a sentence that had been based on both valid and invalid factors.[40] The Court held that such an affirmance is impermissible.[41] Central to this holding was the Court's conclusion that reliance on invalid departure factors is "an incorrect application of the sentencing guidelines" within the meaning of 18 U.S.C. § 3742(f)(1).[42] The Court expressly rejected the dissent's view that section 3742(f)(2) provides the exclusive vehicle for departure review.[43]

Williams thus interpreted the SRA as creating a two-tiered approach to departure review. The appellate court must first determine whether the sentencing judge's basis for departure was valid. In assessing the validity of the basis for departure, the court must consider the relevant guidelines, policy statements, and official commentary of the Commission.[44] If the court determines that the basis for departure is invalid, and that the sentence would have been different but for the sentencing judge's reliance on the invalid departure factor, the court must vacate the sentence and remand.[45]

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[40] *Id.* at 198. In *Williams*, the sentencing judge had departed from the applicable range of 18-24 months of imprisonment. The judge imposed a sentence of 27 months, finding that Williams's Criminal History Category ("CHC") understated the seriousness of his past criminal history. *See id.* at 196–97 (citing U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (1991)). In concluding that Williams's CHC underrepresented the seriousness of his past criminal conduct, the sentencing judge noted that: (1) two previous convictions were too old to be counted in the calculation of Williams's CHC; and (2) several prior arrests could not be included in calculating the CHC. *See id.* at 196. The United States Court of Appeals for the Seventh Circuit held that while it was permissible to depart based on convictions too remote in time to be part of the CHC calculation, it was impermissible to depart on the basis of prior arrests. *See id.* at 197. However, the Seventh Circuit affirmed the departure sentence, holding that a departure based on both valid and invalid factors could be affirmed if the resulting departure was "reasonable" in light of the valid factors standing alone, and that the sentence in *Williams* met this reasonableness standard. *See id.* at 197–98.

[41] *See id.* at 203.

[42] Section 3742(f)(1) requires the appellate court to remand any sentence imposed "*as a result of an incorrect application*" of the Guidelines. 18 U.S.C. § 3742(f)(1) (1994) (emphasis added). This causal connection requirement permits the appellate court to engage in a harmless error analysis, but not to uphold a departure sentence on its own assessment of the reasonableness of that sentence. In other words, the Court instructed appellate courts to remand any case in which the sentencing judge appeared to rely on an invalid departure factor, unless the appellate court concludes that the sentencing judge "would have imposed the same sentence had it not relied upon the invalid factor or factors." *Williams*, 503 U.S. at 203.

[43] *See Williams*, 503 U.S. at 200–01. Section 3742(f)(2) authorizes the appellate court to set aside a sentence and remand only if the sentence is outside the Guidelines range and is unreasonable. *See* 18 U.S.C. § 3742(f)(2) (1994). Under the dissent's view, if the appellate court concludes that the departure sentence is "reasonable," it must affirm the sentence. *See Williams*, 503 U.S. at 208–09 (White, J., joined by Kennedy, J., dissenting).

[44] *See Williams*, 503 U.S. at 202.

[45] *See id.* at 202–03.

If, however, the appellate court concludes that the basis for departure is valid, it then proceeds to the second step of the departure analysis—determining whether the resulting sentence is unreasonable.[46] This determination focuses on the direction and extent of the departure in light of the sentencing court's articulated grounds for departure. The *Williams* Court emphasized that this two-tiered departure review flowed inextricably from the review scheme set up by Congress; this interpretation of the review process is the only one consistent with the language of section 3742.[47] This approach also makes sense as a policy matter. It acknowledges a need for a more searching review of the decision to depart, a decision which depends upon interpretation of the Guidelines, policy statements, and commentary, while reserving a more limited "reasonableness" review for the inherently more discretionary determination of how much to depart from the applicable Guidelines range.

B. *Standards of Appellate Review*

By definition, appellate courts do not work with a clean slate. The task of the appellate courts is limited to reviewing the decisions of the trial courts. The performance of this task is governed by standards of review, which "define the depth or intensity with which trial court rulings of fact, law, and discretion are subjected to review."[48] In other words, standards of review guide the appellate court by indicating how much deference is to be accorded the lower court's determinations on a given issue. These standards occupy a continuum of degrees of deference, ranging from no review at all, through such deferential standards as review for abuse of discretion and review for clear error,[49] to plenary, or de novo review.[50] In addition to aiding the appellate court in determining how deferentially to review lower court determinations, standards of review allocate decision-making authority between trial and appellate

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[46] *See id.*

[47] *See id.* at 202 (reading § 3742 to require two-tiered review is necessary "[i]n order to give full effect to both [§ 3742(f)(1) and § 3742(f)(2)]").

[48] J. Dickson Phillips, Jr., *The Appellate Review Function: Scope of Review*, 47 LAW & CONTEMP. PROBS. 1, 1 (Spring 1984).

[49] *See* Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 5-7 (1991). Professor Sward characterizes the abuse of discretion standard as more deferential than the clearly erroneous standard, although she notes that the precise distinction between the two is somewhat elusive, and her characterization of the relative deference each represents "may be more intuitive than scientific." *Id.* at 7 n.18; *see also* Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 480 (1988) (characterizing abuse of discretion review as "the most deferential standard of review available with the exception of no review at all").

[50] *See* Sward, *supra* note 49, at 5-7.

courts—the trial court's effective authority is expanded to the extent deferential review standards are employed, while the appellate court's effective authority is expanded through less deferential appellate review.[51]

Determining the proper standard of review thus is critical, not only to the litigants who need to understand the contours of appellate review, but also to the legal system itself for the proper allocation of authority and resources.[52] Despite the importance of standards of appellate review, determining what standards apply to what types of questions has been notoriously difficult.[53] As the Supreme Court has noted, in the absence of legislative guidance or long-standing historical practice providing clear guidance about the standard of review in a particular context, "it is uncommonly difficult to derive from the pattern of appellate review of other questions an analytical framework that will yield the correct answer."[54]

Two areas relevant to this Article have created particularly vexing problems in determining the proper standards of review: first, mixed questions of fact and law, and second, review of district court decisions that are in some sense "discretionary." Mixed questions have been defined as those in which "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to established facts is or is not violated."[55] Courts have been unable to articulate clear rules about the proper review standards to be applied to mixed questions.[56] In recent years, the

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[51] *See* Stith & Koh, *supra* note 7, at 243.

[52] *See* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 1.01, at 1-2 (1992) (noting that standards of review have real impacts in appellate decisionmaking and thus "cannot be dismissed as sheer politics").

[53] The standard of review to be applied to some determinations has long been settled. It is clear, for example, that findings of fact are reviewed under the deferential clearly erroneous standard, *see* FED. R. CIV. P. 52(a), while conclusions of law are reviewed under the non-deferential de novo standard. *See* United States v. McConney, 728 F.2d 1195, 1203 (9th Cir. 1984) (en banc). Much more problematic are the standards to be applied to mixed questions of fact and law. *See infra* notes 55–57 and accompanying text.

[54] Pierce v. Underwood, 487 U.S. 552, 558 (1988).

[55] Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982). In *Swint*, the Court addressed the proper standard of review to be applied to deciding whether a union seniority system that had a disparate impact on minorities was created with an intent to discriminate. The Court held that intent to discriminate was a "pure question of fact," not a mixed question, and thus should be reviewed under the clearly erroneous standard. *Id.* at 287–90.

[56] *See, e.g.*, *McConney*, 728 F.2d at 1200 (characterizing standard of review jurisprudence as being in a "pervasive" state of "disarray"); Sward, *supra* note 49, at 34 (noting that the line between mixed questions reviewed deferentially and those reviewed independently is "highly fluid," and this area of the law is "fraught with pitfalls").

Supreme Court has adopted a loose, functional analysis to determine whether a mixed question is to be treated as one of law or fact for appellate review purposes.[57]

Similar problems have arisen where the trial court determination to be reviewed entails a mix of legal, factual and discretionary elements.[58] Appellate courts have long recognized that certain types of decisions call for choices from a range of permissible options. Such judgment calls are reviewed under the deferential abuse of discretion standard.[59] Common examples include certain litigation procedure and docket management determinations such as whether to hold separate trials, or to grant a new trial, or to permit certain types of discovery. These judgment calls nevertheless are informed by considerations of general applicability, or legal standards, that are part of the appellate court's law declaration function.[60] Characterizing the review of legal determinations wrapped in discretionary decisions creates some difficult problems which are explored later in this Article.[61]

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[57] *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 114 (1985) (observing that proper characterization of mixed questions "has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question").

[58] *See, e.g.*, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398–405 (1990) (involving application of Rule 11 sanctions); *Pierce*, 487 U.S. at 558–60 (involving award of fees and expenses to party prevailing against the United States under the Equal Access to Justice Act); *see also* CHILDRESS & DAVIS, *supra* note 52, § 4.01 at 4-6 ("[D]eciding when review should fall under an abuse of discretion standard (rather than applying a de novo standard of review as a legal matter) can be as difficult as fundamentally sorting discretion from law.").

[59] *See* CHILDRESS & DAVIS, *supra* note 52, § 4.01 at 4-2 to 4-3.

> Many decisions made by the district judge in orchestrating a bench or jury trial before him—or in more broadly supervising his docket, the litigation process, and the general operation of the district court—involve a certain measure of judgment or on-the-scene presence. These decisions are classified generally as discretionary and are deferred to, within limits, on appeal . . . . *Abuse of discretion* is the catchphrase usually recited as the standard of review over such discretionary choices.

Id.

[60] *See id.* § 4.01, at 4-3; *see also* Abrams v. Interco, Inc., 719 F.2d 23, 28 (2d Cir. 1983) ("It is not inconsistent with the [abuse of] discretion standard for an appellate court to decline to honor a purported exercise of discretion which was infected by an error of law.").

[61] *See infra* Part II.C (exploring the ambiguity of the abuse of discretion standard).

C. *Determining the Standard of Review of Departure Decisions: The Experience of the Courts of Appeals*

Prior to the Court's decision in *Koon*, the courts of appeals had reached a near consensus about the appropriate standard of review to be applied to departures from the Guidelines. An early articulation of that standard appears in *United States v. Diaz-Villafane*,[62] in which the United States Court of Appeals for the First Circuit characterized departure review as a three step process:

> First, we assay the circumstances relied on by the district court in determining that the case is sufficiently "unusual" to warrant departure. That review is essentially plenary: whether or not circumstances are of a kind or degree that they may appropriately be relied upon to justify departure is, we think, a question of law.
>
> Second, we determine whether the circumstances, if conceptually proper, actually exist in the particular case. That assessment involves factfinding and the trier's determinations may be set aside only for clear error.
>
> Third, once we have assured ourselves that the sentencing court considered circumstances appropriate to the departure equation and that those factors enjoyed adequate record support, the direction and degree of departure must, on appeal, be measured by a standard of reasonableness.[63]

In effect, *Diaz-Villafane* treats the sentencing judge's departure decision as involving three distinct processes, each of which is subject to a different standard of review: first, legitimacy of the basis for departure is reviewed de novo; second, factual findings are reviewed for clear error; and third, the direction and degree of departure is reviewed highly deferentially under what amounts to an abuse of discretion standard.[64]

Diaz-Villafane proved to be very influential. By the time *Koon* was argued, eleven of the twelve courts of appeals hearing Guidelines cases had adopted

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[62] 874 F.2d 43 (1st Cir. 1989).

[63] *Id.* at 49–50. The court took special care to emphasize that this third inquiry must take place with "full awareness of, and respect for," the sentencing court's "superior 'feel' for the case." *Id.* at 50; *see also* Bruce M. Selya & Matthew R. Kipp, *An Examination of Emerging Departure Jurisprudence Under the Federal Sentencing Guidelines*, 67 NOTRE DAME L. REV. 1, 39–40 (1991) (discussing the appellate courts' deferential review of decisions involving direction and degree of departure).

[64] *See* United States v. Chester, 919 F.2d 896, 900 (4th Cir. 1990) (following departure review approach similar to that used in *Diaz-Villafane*, but characterizing the reasonableness review as abuse of discretion review); *see also* Selya & Kipp, *supra* note 63, at 18–19 (stating that "appellate review must take into account the source of the lower court's determination: whether it arises from an exercise of *discretion*, a finding of fact, or a conclusion of law") (emphasis added).

some version of that standard.[65] Ironically, only the First Circuit then deviated from this approach, overruling *Diaz-Villafane* in favor of a more deferential standard of review in *United States v. Rivera*.[66]

Because *Rivera* foreshadows *Koon*, it is worthy of discussion. *Rivera* first canvassed the basic statutory framework of the departure provisions, emphasizing the statutory directive to sentencing judges to impose a sentence within the Guidelines range in the usual case.[67] The court then examined the impact of the Guidelines themselves on this statutory departure scheme, placing potential departure situations in four categories, which are derived from the nature of the Commission's treatment of the issue before the court: (1) cases outside the "heartland"; (2) encouraged departures; (3) discouraged departures; and (4) forbidden departures.[68]

The first category is the prototypical unusual case, involving some relevant feature not expressly addressed in the Guidelines.[69] This "heartland" concept embodies the recognition that the Commission could not anticipate every possible relevant sentencing factor as it might apply to every possible case. Thus, the sentencing judge remains free to take into consideration otherwise unaccounted-for factors.[70]

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[65] *See, e.g.*, United States v. Fierro, 38 F.3d 761, 775 n.7 (5th Cir. 1994); United States v. Griffin, 945 F.2d 378, 380–81 (11th Cir. 1991); United States v. Lira-Barraza, 941 F.2d 745, 746 (9th Cir. 1991) (en banc), *overruled by* United States v. Beasley, 90 F.3d 400 (9th Cir. 1996); United States v. Feekes, 929 F.2d 334, 336 (7th Cir. 1991); United States v. Kikumura, 918 F.2d 1084, 1110–11 (3d Cir. 1990); United States v. Lara, 905 F.2d 599, 602–03 (2d Cir. 1990); United States v. Summers, 893 F.2d 63, 66–67 (4th Cir. 1990); United States v. White, 893 F.2d 276, 277–78 (10th Cir. 1990); United States v. Burns, 893 F.2d 1343, 1345 (D.C. Cir.), *rev'd on other grounds*, 501 U.S. 129 (1990); United States v. Lang, 898 F.2d 1378, 1380 (8th Cir. 1989); United States v. Rodriguez, 882 F.2d 1059, 1067 (6th Cir. 1989).

[66] 994 F.2d 942, 950–52 (1st Cir. 1993).

[67] *See id.* at 946–47 ("The upshot, as we have said, is that in ordinary cases the district court must apply the Guidelines. In other cases, the court may depart provided that it gives reasons for the departure and that the resulting sentence is 'reasonable.'").

[68] *Id.* at 947–48.

[69] *See supra* text accompanying note 24 (describing the Commission's "heartland" language).

[70] For example, in *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990), the court held that a substantial upward departure would be permissible for a defendant convicted of several explosives and passport offenses, on the ground that the defendant was planning a series of major terrorist bombings. This took the case out of the heartland of the typical offense encompassed in the applicable explosives and passport offense guidelines. *Id.* at 1104–09.

In *United States v. Restrepo*, 936 F.2d 661 (2d Cir. 1991), the court affirmed downward departures for several defendants playing minimal roles in a huge money laundering scheme.

The second category, encouraged departures, encompasses the set of factors specified by the Commission as taking the case out of the "heartland" of the applicable guideline. For example, Part 5K of the Guidelines lists a host of offense and offender characteristics, such as use or possession of a dangerous weapon or instrumentality,[71] coercion or duress,[72] or the offender's diminished capacity,[73] that in the Commission's view may warrant departure. Similarly, particular guidelines provisions may contain encouraged departure factors.[74]

The third category, discouraged departures, includes those offender characteristics listed in Part 5H of the Guidelines, that the Commission has said are "not ordinarily relevant" in determining whether to depart.[75] These include such factors as the offender's age,[76] education and vocational skills,[77] mental and emotional condition,[78] family ties and responsibilities,[79] and past military, charitable or civic contributions.[80] Because the Commission has discouraged, but not absolutely forbidden, use of these factors, the district court must determine whether such a factor is present to such a degree as to make the case an "extraordinary" one. Finally, there are a few factors, such as race, sex, national origin, creed, religion, socioeconomic status,[81] as well as lack of guidance as a youth,[82] that the Commission has prohibited sentencing judges to use in support of departures.

This classification scheme underlies the court's evaluation of the

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The sentencing judge found these defendants to be unusually situated because their sentences were magnified well beyond the extent of individual culpability due to the impact of the amount of money laundered in the scheme as a whole. The Second Circuit concluded: "[W]here, as here, an offense level has been extraordinarily magnified by a circumstance that bears little relation to the defendant's role in the offense, a downward departure may be warranted on the ground that minimal participation exists to a degree not contemplated by the guidelines." *Id.* at 667.

[71] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.6 (1997).

[72] *See id.* § 5K2.12.

[73] *See id.* § 5K2.13.

[74] For example, the application notes to § 2L1.1, the Guidelines section which governs sentences involving the smuggling, transporting or harboring of illegal aliens, specify that "[i]f the offense involved substantially more than 100 aliens, an upward departure may be warranted." *Id.* § 2L1.1 application note 4.

[75] *Id.* ch. V, pt. H introductory commentary.

[76] *See id.* § 5H1.1.

[77] *See id.* § 5H1.2.

[78] *See id.* § 5H1.3.

[79] *See id.* § 5H1.6.

[80] *See id.* § 5H1.11.

[81] *See id.* § 5H1.10.

[82] *See id.* § 5H1.12.

"partnership" between the district and appellate courts as their respective roles bear on the standard of appellate review.[83] *Rivera* suggests that plenary review is appropriate in assessing whether particular circumstances relied upon by the district court are of the "kind" the Guidelines permit as a basis for departure.[84] The court emphasized that this type of determination is a "quintessentially legal" one, with respect to which the district court possesses no special competence.[85] On the other hand, the court suggested that departures often turn on "a judgment about whether the given circumstances, as seen from the district court's unique vantage point, are usual or unusual, ordinary or not ordinary, and to what extent."[86] The court suggested that district courts do possess special competence with respect to these fact-intensive "heartland" evaluations, and found it appropriate to extend the deference accorded district court determinations of fact and of "direction and degree" under *Diaz-Villafane* to these determinations as well.[87]

Rivera clearly is designed to accord greater deference to certain types of departure determinations. Note, however, that the *Rivera* court did not characterize this approach as a dramatic break with previous departure review case law,[88] nor did it deny that evaluation of the structure and theory of both relevant individual guidelines and the Guidelines taken as a whole should guide the district court in its departure decisions. Such determinations have a substantial "legal" component in that they can meaningfully be reviewed by a court of appeals.[89] Thus, *Rivera* is best seen as an effort to provide some additional "leeway" to district courts in making judgments about the "unusualness" of particular cases;[90] it did not represent an abandonment of appellate evaluation of the grounds for departure in light of relevant structural guidance provided by the Guidelines.

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[83] United States v. Rivera, 994 F.2d 942, 949–50 (1st Cir. 1993).

[84] *Id.* at 950–51.

[85] *Id.* at 951.

[86] *Id.*

[87] *Id.* at 951–52.

[88] *See* United States v. Quinones, 26 F.3d 213, 217 (1st Cir. 1994) (stating that departure review is governed by the three-step process that was set forth in *Diaz-Villafane*, and "refined" by *Rivera*); *see also* Wendy J. Thurm, *The First Circuit: Everything Old is New Again*, 7 Fed. Sent. Rep. (Vera Inst. of Justice) 227 (1995) (reviewing First Circuit departure case law and concluding that *Rivera* did not substantially change departure review).

[89] *See, e.g.*, United States v. DeMasi, 40 F.3d 1306, 1323–24 (1st Cir. 1994) (reversing a downward departure that was based on the defendant's history of charitable and community service on the ground that the sentencing judge erred in evaluating the "extraordinariness" of the defendant's service exclusively by comparison to other bank robbers).

[90] *Rivera*, 994 F.2d at 950–51.

II. THE COURT'S ANALYSIS IN *KOON V. UNITED STATES*

A. *The Facts*

Koon arose from the infamous videotaped beating of Rodney King by Los Angeles police officers that occurred after a high speed chase on the streets and freeways of the Los Angeles area.[91] After the State of California failed to obtain convictions against the officers in state court on charges of assault with a deadly weapon and use of excessive force,[92] federal authorities charged several officers, including petitioners Stacey C. Koon and Laurence M. Powell, with criminal violations of King's constitutional rights.[93] Koon and Powell were convicted.[94]

In calculating the defendants' sentences under the United States Sentencing Guidelines, the district court concluded that the applicable Guidelines Sentencing Range, or "GSR," for each defendant was seventy to eighty-seven months imprisonment.[95] The district court, however, decided to impose a

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[91] *See* United States v. Koon, 833 F. Supp. 769, 775 (C.D. Cal. 1993), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996).

[92] *See Four Officers Not Guilty in King Beating*, UPI, Apr. 29, 1992, *available in* LEXIS, News Library, UPI File.

[93] *See* 18 U.S.C. § 242 (1994) (criminalizing willful "deprivation of any rights, privileges, or immunities secured or protected by the Constitution" by one acting "under color of any law").

[94] Two other officers, Ted Briseno and Timothy Wind, also were charged. The jury acquitted Briseno and Wind. *See* United States v. Koon, 34 F.3d 1416, 1425 (9th Cir. 1994), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996).

[95] *See Koon*, 833 F. Supp. at 779–85. The Guidelines employ a matrix, with the applicable sentencing range derived from an intersection of the defendant's "Offense Level" and "Criminal History Category." *See* U.S. SENTENCING GUIDELINES MANUAL ch. V, pt. A (1997) (Sentencing Table). The Offense Level, represented by the vertical axis of the Sentencing Table, is calculated by determining the defendant's "Base Offense Level," which is derived from the offense of conviction, and adjusting that Base Offense Level in light of various indicators of the real offense conduct and other adjustments noted in Chapter Three of the Guidelines Manual. The Criminal History Category is based on the number and seriousness of the defendant's sentences for prior convictions. *See id.* (Commentary to Sentencing Table).

The court concluded that each offender's total Offense Level was 27. The Base Offense Level for a § 242 violation was six plus the offense level for the appropriate underlying offense, aggravated assault. *See Koon*, 833 F. Supp. at 780. The Base Offense Level for aggravated assault was 15. *See id.* at 781. This, in turn, was adjusted upward four levels for use of a dangerous weapon, and another two levels for infliction of bodily injury, resulting in a total Offense Level of 27. *See id.* at 781–83. Both Koon and Powell were first-time criminal

downward departure of five levels because the victim's (Mr. King's) wrongful conduct contributed significantly to provoking the offense behavior.[96] The court imposed an additional three level downward departure, based on a combination of four factors:[97] the likelihood that the defendants would face serious abuse in prison;[98] the defendants' loss of employment and collateral emotional strain associated with such loss;[99] the significant burden on the defendants from successive state and federal prosecutions;[100] and the absence of a need for lengthy incarceration to incapacitate the defendants for public protection.[101]

The defendants appealed their convictions to the United States Court of Appeals for the Ninth Circuit, and the government cross-appealed the sentences imposed.[102] The Ninth Circuit affirmed both the convictions[103] and the district court's calculation of the applicable GSRs.[104] The court, applying a de novo standard of review to the district court's decisions to depart,[105] reversed each of the departures.[106]

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offenders, placing them in Criminal History Category I. According to the Sentencing Table, a total Offense Level of 27 and Criminal History Category I results in a range of 70–87 months. *See* U.S. SENTENCING GUIDELINES MANUAL ch. V, pt. A (1997) (Sentencing Table).

[96] *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (1997) (providing that the sentencing judge may depart if "the victim's wrongful conduct contributed significantly to provoking the offense behavior").

[97] The district court emphasized that none of the four factors, taken individually, would have justified a departure. Rather, departure was justified on the basis of the synergistic effect of the factors taken together. *See Koon*, 833 F. Supp. at 785. *See generally* United States v. Cook, 938 F.2d 149, 151 (9th Cir. 1991) (permitting departure based on a combination of factors).

[98] The court explained that the "widespread publicity and emotional outrage" surrounding the case suggested that Koon and Powell were "particularly likely to be targets of abuse" in prison. *Koon*, 833 F. Supp. at 788.

[99] *See id.* at 798.

[100] *See id.* at 790.

[101] *See id.*

[102] *See* United States v. Koon, 34 F.3d 1416, 1425–26 (9th Cir. 1994), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996).

[103] *See id.* at 1462.

[104] *See id.* at 1461–62.

[105] *See id.* at 1451 (citing United States v. Lira-Barraza, 941 F.2d 745, 746 (9th Cir. 1991) (en banc)). *Lira-Barraza* employed the three-step standard of review popularized by *Diaz-Villafane*, in which the validity of the basis for departure is subject to de novo review. *See supra* notes 62–65 and accompanying text.

[106] *See Koon*, 34 F.3d at 1452–60.

B. *Why Abuse of Discretion?: The Court's Reasoning*

The Supreme Court granted certiorari "to determine the standard of review governing appeals from a district court's decision to depart from the sentencing ranges in the Guidelines."[107] Justice Kennedy, writing for a unanimous Court on this issue,[108] rejected the tripartite standard of review employed by the Ninth Circuit, in favor of what he characterized as a "unitary abuse-of-discretion standard."[109] Two themes were central to Justice Kennedy's reasoning: first, Congress, in creating the Guidelines scheme, intended that sentencing judges retain substantial discretion, an intention best executed through deferential review of departures; second, notions of institutional comparative advantage traditionally used by the Court in determining the proper standard of appellate review favored the more deferential abuse of discretion review.

1. *Congressional Guidance Regarding Standard of Review*

The Court's adoption of an abuse of discretion standard was influenced heavily by its conclusion that Congress intended in the Sentencing Reform Act to create a limited appellate role, preserving a significant degree of the trial judge's traditional sentencing discretion.[110] The Court cited several sources in support of its assessment of congressional intent. First, it relied heavily on language added by Congress in 1988 to 18 U.S.C. § 3742(e) which requires courts of appeals to "give due deference to the district court's application of the guidelines to the facts."[111] The Court implied that one could infer from this

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[107] Koon v. United States, 116 S. Ct. 2035, 2043 (1996).

[108] Justices Stevens, Souter, Ginsburg and Breyer all agreed with the Court's analysis on the standard of review, but dissented for various reasons from the majority's application of the standard. *See id.* at 2054 (Stevens, J., concurring in part and dissenting in part); *id.* (Souter, J., joined by Ginsburg, J., concurring in part and dissenting in part); *id.* at 2056 (Breyer, J., joined by Ginsburg, J., concurring in part and dissenting in part).

[109] *Id.* at 2047–48.

[110] *See id.* at 2046–47. It explained:

> We agree that Congress was concerned about sentencing disparities, but we are just as convinced that Congress did not intend, by establishing limited appellate review, to vest in appellate courts wide-ranging authority over district court sentencing decisions. Indeed, the text of § 3742 manifests an intent that district courts retain much of their traditional sentencing discretion.

Id. at 2046.

[111] As originally enacted in 1984, § 3742 provided: "The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and

"due deference" language an intent to limit the intensity of appellate review.[112] At least one commentator previously defended a similar inference, arguing that abuse of discretion review was the standard most consistent with this due deference language.[113] Second, the Court cited language from the principal legislative history of the SRA, the Senate Judiciary Committee Report, which provided that "the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court."[114] Finally, the Court quoted the following language from *Williams v. United States*:[115]

> Although the [Sentencing Reform] Act established a limited appellate review of sentencing decisions, it did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion.... The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence."[116]

In short, the Court concluded from the due deference language, legislative history and case law that Congress created a regime of limited appellate review and substantial residual discretion for sentencing judges.[117] From this conclusion, the Court inferred a congressional purpose to create a deferential

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shall accept the findings of fact of the district court unless they are clearly erroneous." 18 U.S.C. § 3742(d) (Supp. III 1985). The language now reads:

> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous *and shall give due deference to the district court's application of the guidelines to the facts.*

18 U.S.C. § 3742(e) (1994) (emphasis added).

[112] *Koon*, 116 S. Ct. at 2046.

[113] *See, e.g.*, Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Guidelines*, 66 S. CAL. L. REV. 621, 634–39 (1992) (arguing that Congress did not intend to confer de novo review upon courts of appeals, and that the "due deference" language of § 3742(e) "makes the most sense when treated like the abuse-of-discretion standard rather than like de novo review").

[114] S. REP. No. 98-225, at 150 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3333.

[115] 503 U.S. 193 (1992).

[116] *Koon*, 116 S. Ct. at 2046 (quoting *Williams*, 503 U.S. at 205).

[117] *See id.* at 2046.

standard of review of departure decisions.[118]

2. *Institutional Considerations*

Recognizing that the SRA did not expressly resolve the standard of review question,[119] the Court supplemented its interpretation of the SRA with a functional analysis of departure review, concluding that district courts have an "institutional advantage over appellate courts" in making departure decisions which counsels in favor of a deferential abuse of discretion standard.[120] Its characterization of the sentencing judge's departure inquiry was critical to this analysis. In the Court's view, the sentencing judge's central task in determining whether departure is permissible is to decide whether the case involves circumstances unusual enough to take it out of the heartland of cases governed by the relevant guidelines, a task which necessarily requires comparison to the facts of other pertinent Guidelines cases.[121] Viewed from this perspective, the Court suggested that sentencing judges possess two significant institutional advantages over appellate courts in making these determinations. First, the sentencing judge's proximity to the day-to-day operations of the Guidelines provided a basis for comparison appellate courts lack, because appellate courts see only a fraction of Guidelines cases.[122]

Second, the Court expressed the belief that because the departure inquiry requires "the consideration of unique factors that are 'little susceptible . . . of useful generalization,'"[123] de novo review is "'unlikely to establish clear guidelines for lower courts.'"[124] Under the functional standards of review analysis employed by the Court in previous cases, this lack of generalizability of departure principles suggests the need for deferential appellate review. Specifically, the Court analogized departure review to the Rule 11 sanctions and Equal Access to Justice Act attorney's fees determinations which it had addressed before in *Cooter & Gell v. Hartmarx Corp.*[125] and *Pierce v.*

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[118] *See id.* A key step in the Court's reasoning is its characterization of the sentencing judge's decision to depart as one which "embodies the traditional exercise of discretion by a sentencing court." *Id.*

[119] *See id.* (acknowledging that while Congress's intent to create a scheme of limited appellate review was clear, the standard of review Congress intended appellate courts to employ was not).

[120] *Id.* at 2047.

[121] *See id.* at 2046–47.

[122] *See id.*

[123] *Id.* at 2047 (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990)).

[124] *Id.* (quoting *Cooter & Gell*, 496 U.S. at 405).

[125] 496 U.S. 384 (1990).

Underwood,[126] respectively.

C. *Applying the Standard: The Ambiguities of* Koon*'s Abuse of Discretion Review*

Because of the ambiguity inherent in the abuse of discretion standard and confusion regarding the Court's application of that standard in *Koon*, it is unclear how dramatically the *Koon* standard deviates from the tripartite standard popular before *Koon*. This section suggests that it is possible to read *Koon* to permit appellate courts to engage in fairly aggressive review of sentencing judges' reasons for departure.

1. *What Is an Abuse of Discretion?*

One of the difficulties in understanding the application of standards of review is that they are not self-enforcing; for example, a court can say that it is applying a clear error standard, but who is to say when an error is "clear"?[127] Even if one assumes that articulation of the standard constrains the appellate court's analysis in some meaningful way, the nature and degree of that constraint is not inherent in the language of the standard, but is realized only through concrete application. The abuse of discretion standard seems particularly prone to this uncertainty regarding its meaning. A number of judges and scholars have noted that there really is no such thing as "the" abuse of discretion standard; it is a phrase courts have used to describe a variety of review processes of differing intensities.[128]

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[126] 487 U.S. 552 (1988). According to the *Koon* Court, "[c]onsiderations like these [referring to the institutional advantages of district courts in deciding highly fact-specific issues] persuaded us to adopt the abuse-of-discretion standard in" *Cooter & Gell* and *Pierce*. 116 S. Ct. at 2047.

In *Cooter & Gell*, the Court held that a district court's decision to impose a Rule 11 sanction was subject to abuse of discretion review. *Pierce* involved a similar issue: the proper standard of review of a district court's determination that the government's litigation position was "substantially justified," precluding an award of attorney's fees against the government under the Equal Access to Justice Act ("EAJA"). *See infra* notes 188–97 and accompanying text (discussing *Pierce* and *Cooter & Gell* in more detail).

[127] *See, e.g.*, Steven Alan Childress, *"Clearly Erroneous": Judicial Review over District Courts in the Eighth Circuit and Beyond*, 51 MO. L. REV. 93, 95 (1986).

[128] As Judge Henry J. Friendly explained:

> There are a half dozen different definitions of "abuse of discretion," ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.

Understanding what abuse of discretion means is further complicated by the fact that it incorporates, in some sense, other standards of review. For example, a district court abuses its discretion when it relies on a materially incorrect view of the law in making what otherwise is characterized as a discretionary choice.[129] The *Koon* Court acknowledged this, going so far as to suggest that review of such determinations about applicable law made within the abuse of discretion standard is indistinguishable from de novo review.[130] This creates a potential for confusion regarding the appellate court's role, because de novo analyses of essentially legal questions are subsumed within a broader analysis that is labeled "abuse of discretion."[131]

The range of possible levels of deference implied by the label "abuse of discretion" and the difficulty of disentangling the legal and factual determinations that are constituent elements of a district court's discretionary determination make it difficult to discern precisely how abuse of discretion review of departures differs from the tripartite standard employed by the

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Friendly, *supra* note 29, at 763; *see also* CHILDRESS & DAVIS, *supra* note 52, § 4.01, at 4-13 to 4-16 (describing abuse of discretion standard as an "umbrella term" describing a "*range* of appellate responses with varying degrees of deference handed down"); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 650 (1971) (describing "gradations of discretion, ranging from the toughest, most impenetrable variety to types that are too flimsy to ward off any appellate scrutiny that looks askance at the trial court's ruling").

[129] *See, e.g.*, *Cooter & Gell*, 496 U.S. at 402 (discussing how abuse of discretion review "would not preclude the appellate court's correction of a district court's legal errors").

[130] The *Koon* Court stated:

> The Government is quite correct that whether a factor is a permissible basis for departure under any circumstances is a question of law, and the court of appeals need not defer to the district court's resolution of the point. Little turns, however, on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse of discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law.

Koon, 116 S. Ct. at 2047 (citations omitted). The Court then went on to imply that this concept, in the Guidelines departure context, is limited to whether a given factor *ever* can be a permissible basis for departure. *See id.* at 2047.

However, even the Court's own application of the standard suggests that the issue is much more complex than this analysis indicates. *See infra* Part II.C.2. *See generally* CHILDRESS & DAVIS, *supra* note 52, § 4.01, at 4-5 (noting that abuse of discretion review can send "an unclear message to future courts by wrapping the legal element involved in *abuse of discretion* language").

[131] *See* CHILDRESS & DAVIS, *supra* note 52, § 4.01, at 4-4 to 4-6 (criticizing courts' reflexive use of shorthand "abuse of discretion" language and urging courts to focus more carefully on the precise nature of the question being reviewed).

appellate courts prior to *Koon*.[132] Moreover, an examination of the *Koon* Court's application of the abuse of discretion standard suggests that the Court itself seemed unsure exactly how deferential the standard is to be.

2. *Review of the* Koon *Departures*

Applying its newly-minted abuse of discretion standard, the Court addressed in turn each of the district court's bases for departure, beginning with the five-level victim misconduct departure. The Ninth Circuit had rejected this departure, concluding that the possibility of victim misconduct is inherent in the offense and therefore already adequately considered in the applicable guidelines.[133] Recognizing that the differing conclusions of the district court and the Ninth Circuit arose from different conceptions of the "heartland" of section 2H1.4, the applicable guideline, the Supreme Court held that the district court's view was correct.[134] Although the Court articulated the ultimate result of its analysis in abuse of discretion terms,[135] the way the Court resolved the disputed issue indicated that the issue turned on the Court's interpretation of

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[132] Indeed, it is plausible to read *Koon* to impose a largely semantic change, simplifying an awkward, unduly complex tripartite standard by collapsing it into a single review standard. *See Koon*, 116 S. Ct. at 2047–48 ("That a departure decision, in an occasional case, may call for a legal determination does not mean, as a consequence, that parts of the review must be labeled *de novo* while other parts are labeled abuse of discretion"). At least one appellate court appears to have so interpreted *Koon*. *See* United States v. Dutchie, No. 95-4052, 1996 U.S. App. LEXIS 17524, at *10 (10th Cir. July 17, 1996) ("Subject to the overriding requirement that we accord the district court's departure decision substantial deference, *Koon* does not alter the three-tiered review process we apply in analyzing the propriety of a district court's decision to depart upward.").

[133] *See* United States v. Koon, 34 F.3d 1416, 1459–60 (9th Cir. 1994), *aff'd in part, rev'd in part*, 116 S. Ct. 2035 (1996).

[134] *See Koon*, 116 S. Ct. at 2048 (stating that the district court's analysis "showed a correct understanding" in "interpreting [the] heartland" of the applicable guideline), 2049 (stating that the Ninth Circuit "misinterpreted both the district court's opinion and the heartland of the applicable Guideline").

Key to this analysis was the Court's agreement with the district court that § 2H1.4 theoretically covered a wide variety of assault-based deprivations of civil rights, ranging from vicious, unprovoked attacks to excessive force cases like *Koon* in which legitimate force shaded into illegal behavior. *See id.* at 2050. In other words, there are aggravated assaults and there are *aggravated assaults*. From this perspective, victim misconduct cannot be presumed to be inherent in offenses governed by that guideline, and thus it may be a permissible ground for departure in an appropriate case.

[135] *See id.* at 2050 (stating that "the District Court did not abuse its discretion in departing downward for King's misconduct in provoking the wrong").

section 2H1.4, and as such was predominantly legal in nature.[136] As a result, the victim misconduct departure does not provide a particularly useful test of the scope of the discretion afforded the sentencing judge by the non-legal components of the abuse of discretion standard of *Koon*. The Court's analysis of the remaining departure factors provides a different manifestation of the application of the abuse of discretion standard, and better highlights the Court's ambivalence as to the intensity of review it permits.

In finding that the sentencing judge did not abuse his discretion in relying on the defendant's susceptibility to abuse in prison and the impact of successive state and federal prosecutions, the Court was extraordinarily deferential to the district court's analysis; indeed, its entire review process is an *ipse dixit*. With respect to prison abuse, the Court cited the sentencing judge's finding that the "widespread publicity and emotional outrage" associated with the videotaped beating made this case unusual, and stated that "the District Court's conclusion that this factor made the case unusual is just the sort of determination that must be accorded deference by the appellate courts."[137]

The Court's analysis of the successive prosecutions issue is even more opaque. Its entire discussion of the issue consists of the following:

> As for petitioners' successive prosecutions, it is true that consideration of this factor could be incongruous with the dual responsibilities of citizenship in our federal system in some instances. Successive state and federal prosecutions do not violate the Double Jeopardy Clause. Nonetheless, the District Court did not abuse its discretion in determining that a "federal conviction following a state acquittal based on the same underlying conduct. . . significantly burden[ed] the defendants." The state trial was lengthy, and the toll it took is not beyond the cognizance of the District Court.[138]

Nowhere does the Court consider whether these factors reflect appropriate penal policy, or whether they are consistent with the structure and purposes of

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[136] This highlights how the abuse of discretion standard encompasses legal determinations. *See supra* notes 129–31 and accompanying text. This was not a situation in which the dispute over the availability of departure turned on such fact-intensive questions as whether the victim's behavior amounted to provocation, or whether there was a sufficient nexus between the victim's actions and the defendant's misconduct to conclude that the former provoked the latter. *See supra* note 133 and accompanying text. Although the Court was not explicit in carving out for separate treatment the legal aspects of its analysis, appellate courts implementing *Koon* must be careful to do so. *See infra* Part IV.B (urging appellate courts applying *Koon* to engage in independent review of the legal components of the departure decision). In this respect, the Court's adoption of a "unitary" abuse of discretion standard obscures the nature of the departure review process.

[137] *Koon*, 116 S. Ct. at 2053.

[138] *Id.* (citations omitted).

Guidelines sentencing, as the statutory provision authorizing departure clearly requires.[139]

The Court's reasoning on these departure grounds boils down to the conclusion that the successive prosecutions and possible prison abuse faced by the defendants make this case meaningfully atypical because the district court said so. In contrast, the Court's majority engaged in a much more searching review of the district judge's other articulated grounds for the three-level downward departure, collateral employment consequences and low likelihood of recidivism. First, the Court found that it was an abuse of discretion to consider collateral employment consequences as a basis for departure. Quite simply, the Court concluded that loss of employment is not uncommon for public officials convicted of violating citizens' rights under color of law, so the Commission must have taken this into account in formulating the applicable guideline.[140]

The Court specifically emphasized that collateral employment consequences were not categorically prohibited as a basis for departure, and criticized the Ninth Circuit's opinion to the extent it can be read to suggest such a prohibition.[141] Thus, by concluding that the district court abused its discretion in considering this factor, the Court could be viewed as substituting its judgment for that of the district court on the question whether this case falls outside the heartland of the applicable guideline.[142]

Similarly, the Court held that the low likelihood of recidivism was an inappropriate basis for departure. The Court reasoned that this factor already was taken into account by the Guidelines through designation of the defendant's criminal history category.[143]

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[139] *See* 18 U.S.C. § 3553(b) (1994) (requiring district court to find an "*aggravating or mitigating*" factor, not adequately considered by the Commission in formulating the Guidelines, "*that should result in a sentence different from that described*" in the Guidelines range) (emphasis added).

[140] *See Koon*, 116 S. Ct. at 2052.

[141] *See id.*

[142] This is not to suggest that the Court's decision on this point is wrong. This seems a much more appropriate reading of the scope of the applicable guideline than that of the district court. Nevertheless, this is a reasonably non-deferential approach to this particular issue, especially in light of the fact that the Court's only argument for its conclusion that the Commission adequately considered this factor is structural—that is, it viewed collateral employment consequences as a sufficiently common factor that the Commission must have considered it. If the district court may permissibly conclude that this case is meaningfully atypical because of the successive prosecutions or the possibility of abuse in prison, why not because of the collateral employment consequences?

[143] *See Koon*, 116 S. Ct. at 2052. This factor is truly categorically excluded. As the Commission explained:

The difficulty in interpreting the real meaning of *Koon*'s abuse of discretion standard is further exacerbated by the different methodologies employed by the Justices purporting to apply the standard. Justices Souter, Ginsburg and Breyer concluded that the prison abuse and successive prosecution rationales were invalid grounds for departure in this case. Justice Souter's dissent, joined by Justice Ginsburg,[144] emphasized the "moral irrationality" of the prison abuse departure, in that it was based specifically on the unusual brutality of the crime.[145] Justice Souter concluded, based on his analysis of the structure and purposes of the relevant statutory and guidelines provisions, that neither Congress nor the Guidelines would have authorized downward departure for the most morally culpable offenders.[146] Justice Souter went out of his way to emphasize that he was not categorically rejecting either of these grounds of departure.[147] His dissent represents a rejection of the sentencing judge's particularized determination that successive prosecution and prison abuse were grounds not adequately considered by the Commission that warrant a departure sentence.

The approaches of the dissenting Justices thus suggest a much less

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> The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of adequacy of criminal history cannot be appropriate.

U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (1997).

144 Justice Breyer, while not formally joining Justice Souter's dissent, indicated agreement with his reasoning. *See Koon*, 116 S. Ct. at 2056 (Breyer, J., concurring in part and dissenting in part) ("I join the Court's opinion with the exception of Part IV-B-3 [dealing with successive prosecutions and susceptibility to abuse in prison]. I agree with Justice Souter's conclusion in respect to that section."). Justice Breyer added his own partial dissent which employed an approach methodologically similar to Justice Souter's, but added that the successive prosecution and prison abuse grounds had been adequately considered and rejected by the Commission. *See id.*

145 *Id.* at 2054–55 (Souter, J., concurring in part and dissenting in part).

146 *See id.* at 2055. Justice Souter's approach appears to emphasize a legal component to the sentencing judge's determination regarding whether a particular factor makes a case *meaningfully* atypical for departure purposes that the majority seems not to recognize. Justice Souter used similar reasoning in rejecting the successive prosecutions rationale as "normatively irrational[ ]" in that it effectively rewards defendants in the federal prosecution for the injustice produced by the failure of the state system adequately to prosecute them. *Id.* at 2056.

147 *See id.* at 2055 n.2 (suggesting the possibility for prison abuse departure based on unusual physical appearance), 2056 (stating that "[t]his is not, of course, to say that a succession of state and federal prosecutions may never justify a downward departure").

deferential conception of the abuse of discretion standard than some of the Court's language suggests. This sends mixed signals to the appellate courts about the intensity of review required by *Koon*.

If the abuse of discretion standard adopted in *Koon* permits appellate courts to treat the validity of sentencing judges' articulated grounds for departure as legal determinations wrapped inside a discretionary decision, then *Koon* does not substantially change the departure review process. It merely obscures the nature of that process, introducing unnecessary confusion. Assuming, however, that the Court intended appellate courts to defer to sentencing judges' conclusions about the existence of proper grounds for departure, *Koon* is inconsistent with the Guidelines scheme and the Court's own standard of review jurisprudence.

III. *KOONS*'S CHOICE OF ABUSE OF DISCRETION REVIEW IS UNJUSTIFIED

Some of *Koon*'s analysis suggests that the Court intended the abuse of discretion standard to change materially the level of deference appellate courts owe sentencing judges' grounds for departure. Much of this analysis vastly underestimates the extent to which the Guidelines system Congress put into place was designed to restrict the traditional discretion of individual sentencing judges. Consequently, it erroneously devalues the proper institutional role of appellate review of departures within that system.

A. *Nothing in the SRA Compels Abuse of Discretion Review*

The *Koon* Court viewed the Guidelines system as minimally disruptive of the individual sentencing judge's traditional prerogatives; according to *Koon*, sentencing judges retain substantial latitude to depart, and appellate review of these departures is limited and deferential.[148] This view was based largely on the Court's interpretation of the language and legislative history of 18 U.S.C. § 3742, along with the interpretive gloss of prior case law.[149] However, the Court's sources better support an alternative vision which emphasizes the Guidelines system as an effort to impose a largely centralized sentencing law, including an evolving body of guiding legal principles to constrain and channel the discretion of individual sentencing judges. Meaningful appellate review of departures constitutes a central aspect of this system, and to the extent *Koon* weakens such review, it is fundamentally inconsistent with the system Congress put into place.

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[148] *See supra* Part II.B.

[149] *See id.*

1. *The "Due Deference" Language*

The Court viewed as significant Congress's admonition to the courts of appeals in section 3742(e) to accord "due deference" to a district court's application of the Guidelines to the facts.[150] While this language appears to be inconsistent with plenary review, it does not compel adoption of abuse of discretion review of departures. The "due deference" language is inherently malleable; nothing in section 3742 indicates exactly how much deference is due any given application of the Guidelines to the facts.[151] Congress could explicitly have required abuse of discretion review, or review for clear error, but it chose more flexible language instead.[152] Because the plain meaning of the due deference language as applied to the sentencing judge's determination of her departure authority is unclear, it is appropriate to seek additional guidance as to the meaning of that language in its legislative history.[153]

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[150] *See supra* notes 110–13 and accompanying text.

[151] It is significant that the application of the Guidelines to facts occurs in a variety of contexts other than determining whether there are permissible grounds to depart. Thus, the "due deference" language applies to a wide variety of Guidelines determinations, ranging from the selection of the appropriate base offense guideline from several possibilities, *see* United States v. Versaglio, 85 F.3d 943, 949 (2d Cir.) (holding that obstruction of justice guideline, rather than misprision guideline, is most analogous guideline for criminal contempt conviction), *modified*, 96 F.3d 637 (2d Cir. 1996), to the applicability of specific offense characteristics such as whether the defendant possessed a weapon in connection with a drug trafficking offense, *see* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (1997), to the applicability of Chapter Three adjustments, such as whether the defendant was a leader or organizer of criminal activity, *see id.* § 3B1.1, or clearly demonstrated acceptance of responsibility, *see id.* § 3E1.1. Some of these determinations resemble findings of pure historical fact, while others more closely resemble conclusions of law.

[152] Congress certainly knew how to articulate a standard of review in the appropriate terms of art. *See, e.g.*, 18 U.S.C. § 3742(e) (1994) (providing for review of district court's findings of fact under the "clearly erroneous" standard). Had it intended appellate courts to use abuse of discretion review, it could have said so. *Cf.* United States v. Turkette, 452 U.S. 576, 580–81 (1981) (inferring from Congress's failure to include limiting language that definition of RICO enterprise is broad enough to include purely criminal associations).

[153] Reliance on legislative history as a tool of statutory construction has, over the past two decades, become somewhat controversial, spawning a vast literature critical of (at least some forms of) its use. *See, e.g.*, Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1131–33 (1983) (arguing that floor debate is too unreliable to be useful in statutory construction); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983) (using public choice theory to demonstrate that judges' reliance on legislative history amounts to nothing more than "wild guesses"); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375–76 (articulating formalist "democratic theory" critique of use of legislative history). Justice Antonin Scalia is probably the most prominent critic of the use of legislative history as

The legislative history surrounding the adoption of the "due deference" language is inconsistent with the unitary abuse of discretion standard adopted by the Court in *Koon*. Representative John Conyers, then-Chairman of the House Judiciary Committee, read into the Congressional Record a section-by-section analysis, which stated with regard to section 3742:

> This [due deference] standard is intended to give the court of appeals flexibility in reviewing an application of a guideline standard that involves some subjectivity. The deference due a district court's determination will depend upon the relationship of the facts found to the guidelines standard being applied. If the particular determination involved closely resembles a finding of fact, the court of appeals would apply a clearly erroneous test. *As the determination approaches a purely legal determination, however, the court of appeals would review the determination more closely.*[154]

This was the only discussion of the relevant language on either the House or the Senate floor.

The section-by-section analysis used the Guidelines' Chapter Three "vulnerable victim" adjustment[155] as an example of the operation of due deference review. It stated:

> Making the subjective determination required by section 3A1.1 (whether the victim was "unusually vulnerable"), unlike resolving purely factual questions, is not uniquely within the district court's expertise. The clearly erroneous standard therefore, would be inappropriate.
>
> On the other hand, because a determination under section 3A1.1 of the sentencing guidelines depends heavily on the unique factual patterns of the

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an interpretive tool, authoring a number of concurring or dissenting opinions criticizing the Court for its use of legislative history. *See, e.g.*, Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in the judgment) (criticizing the Court for relying on legislative history in light of clarity of statutory language). Justice Scalia's critique has influenced the Court, which has become less sanguine about extensive reliance on legislative history since Scalia joined the Court. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 656–66 (1990). Nevertheless, the Court has not abandoned reliance on legislative history, particularly when there is ambiguity in the statutory text. *See, e.g.*, O'Gilvie v. United States, 117 S. Ct. 452, 454–56 (1997) (citing contemporaneous House Report to interpret ambiguous language).

154 134 CONG. REC. 33,303 (1988) (emphasis added).

155 U.S. SENTENCING GUIDELINES MANUAL § 3A1.1(b) (1997) (permitting a two-level upward adjustment "[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct").

case, that determination cannot be considered simply a legal question.[156]

This analysis is not a model of clarity. It could be read to create a sliding scale of review intensity, ranging from deferential clear error review for factual determinations to de novo review for questions of law, with intermediate levels of review for mixed questions.[157] More likely, it is nothing more than a restatement of the prevailing approach to mixed questions of fact and law, a reminder to the appellate courts that not all Guidelines determinations are predominantly legal and thus subject to plenary review.[158]

In any event, two things are apparent. First, whatever Congress meant, characterizing section 3742 as creating an abuse of discretion standard for appellate review of any Guidelines determination seems an odd choice, given the prevailing view that abuse of discretion is the most deferential of the commonly applied standards of review.[159] Second, the scope and flexibility of the due deference language indicates that Congress may well have contemplated that different types of Guidelines determinations would be accorded different

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[156] 134 CONG. REC. 33,303 (1988).

[157] Semi de novo review perhaps? Relatively close review? It is difficult to determine exactly what appellate role Congress contemplated. The suggestion that a court would review "more closely" determinations that approach "purely legal" status arguably is consistent with some sort of intermediate review, however one would label it.

[158] Indeed, this is the view of then-Chairman of the Sentencing Commission William Wilkins, who explained:

> The level of deference due a sentencing judge's application of the guidelines to the facts thus depends on the circumstances of the case. If the issue turns primarily on a factual determination, an appellate court should apply the "clearly erroneous standard." If a case turns primarily on the legal interpretation of a guidelines term or on which of several offense conduct guidelines most appropriately applies to facts as found, the standard moves to one akin to *de novo* review. This "due deference" standard is, then, the standard courts long have employed when reviewing mixed questions of fact and law. On mixed questions, courts have not defined any bright-line standard of review. Rather, the standard of review applied varies with the "mix" of the mixed question.

William W. Wilkins, Jr., *Sentencing Reform and Appellate Review*, 46 WASH. & LEE L. REV. 429, 434–35 (1989).

[159] *See supra* note 49. *But see* Ornelas v. United States, 116 S. Ct. 1657, 1661 n.3 (1996) (characterizing "clear error" as a term of art derived from Rule 52(a) of the Federal Rules of Civil Procedure, and suggesting that "abuse of discretion" is a "preferable term" for the deferential review some lower courts applied to determinations of probable cause and reasonable suspicion). The Court's use of the term "abuse of discretion" in this context may suggest that the Court does not interpret that standard to be as deferential as some courts and commentators have previously suggested.

degrees of deference on appeal.[160] Neither section 3742 nor any relevant legislative history tell us how departure review should be treated. This is a determination left to the courts, to be made based on the institutional considerations addressed in subpart III.B of this Article.

2. *The Senate Report*

The *Koon* Court attempted to bolster its interpretation of the "due deference" language by quoting the following language from the 1983 Senate Report: "The sentencing provisions of this reported bill are designed to preserve the concept that the discretion of a sentencing judge has a proper place in sentencing and should not be displaced by the discretion of an appellate court."[161] This language is too general to provide meaningful guidance on the standard of review issue. It in no way implies an intent to have departures reviewed under a deferential abuse of discretion standard. The Senate Report is silent on this issue. Moreover, the quoted language sheds no light on the meaning of the "due deference" language added by Congress five years later.

To be fair, the Court was using this Senate Report language not to demonstrate conclusively Congress's intent to impose a deferential standard of appellate review of departures, but merely to support the more general proposition that Congress intended to preserve substantial discretion for sentencing judges.[162] This general principle then informs the Court's analysis of the more specific question. However, even this limited use of the Senate Report cannot withstand scrutiny. The Court's selective quotation from the Senate Report leaves out crucial language which emphasizes the importance of strong appellate review in promoting the creation of a rational, principled sentencing scheme as a means to achieve a reduction in unwarranted sentencing disparity (which was, after all, the central purpose of the Guidelines).[163]

The paragraph immediately following the language quoted by the Court goes on to say:

> At the same time, they [the sentencing provisions of the reported bill] are intended to afford enough guidance and control of the exercise of that discretion to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing. Section 3742 accommodates all of these considerations by making appellate review of sentences available equally to the defendant and the government, *and by confining it to cases in which the sentences are illegal,*

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160 *See supra* notes 154–56 and accompanying text.

161 S. REP. NO. 98-225, at 150 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3333.

162 *See* Koon v. United States, 116 S. Ct. 2035, 2047 (1996).

163 *See supra* note 15 and accompanying text.

> *are imposed as the result of an incorrect application of the sentencing guidelines, or are outside the range specified in the guidelines and unreasonable.*[164]

This language emphasizes the importance of the appellate role in shaping Guidelines sentencing. At the same time, it reflects Congress's intent to preserve the sentencing judge's discretion and to limit the appellate role, not by imposing a weak standard of review of departure grounds, but by permitting appellate intervention in sentencing determinations only in limited situations. Thus, the essential residual discretion of the sentencing judge is preserved principally by insulating from appellate review two determinations: the judge's choice of a sentence from within the Guidelines sentencing range,[165] and the judge's discretionary decision not to depart from the Guidelines sentencing range.[166] In other words, Congress attempted to minimize appellate usurpation of appropriate district court authority through limitations on the *scope* of review, not by limitations on the *intensity* of review.

3. *Prior Case Law*

The Court's use of *Williams v. United States*[167] in support of its theory of limited, deferential departure review is similarly flawed. The Court quoted the following language from *Williams*:

> Although the [Sentencing Reform] Act established a limited appellate review of sentencing decisions, it did not alter the court of appeals' traditional deference to a district court's exercise of its sentencing discretion. . . . The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, "it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness

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[164] S. REP. NO. 98-225, at 150 (emphasis added).

[165] *See supra* note 35 and accompanying text; *see also* Bowman, *supra* note 9, at 713 (characterizing as "not a trivial matter" the sentencing judge's discretion to choose the point within the range). As Bowman concludes:

> In effect, the Guidelines say that seventy-five percent of each criminal sentence will be determined by the severity of the current offense and the seriousness of the defendant's prior criminal history, and twenty-five percent of the sentence will rest on the sentencing judge's virtually unreviewable assessment of individualized factors.

Id.

[166] *See supra* note 36 and accompanying text.

[167] 503 U.S. 193 (1992).

of a particular sentence."[168]

Taken out of context, this language appears to support the Court's limited departure review theme.

However, the following language, deleted from the above quotation by the use of ellipses, again highlights the distinction between scope and intensity of review that eluded the Court in *Koon*: "The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left *solely* to the sentencing court."[169] The cited language from *Williams* does no more than recognize the limitations on the scope of appellate review Congress put into place: nothing in that case suggests a need for deferential review of departures. Indeed, precisely the opposite is the case. By recognizing that departures based on invalid grounds are an incorrect application of the Guidelines,[170] the Court acknowledged the essentially "legal" nature of the district court's determination regarding whether departure is permissible in a given case, indicating that deferential review is not appropriate.[171]

In addition, the "substitute its judgment" language in *Williams* was designed to refute the dissenters' contention that the appellate court could simply affirm the partially valid departure on the basis of its own independent assessment that the departure sentence was reasonable.[172] It is in this sense, rather than with respect to the standard of review, that *Williams* emphasized the sentencing judge's prerogative to determine the departure sentence in light of permissible departure factors.[173] This language in no way implies a need for deferential review of the validity of departure factors, although it is consistent with deference as to direction and degree of a valid departure.[174]

In short, *Koon* failed to make a persuasive case that either the SRA's text and legislative history, or *Williams*'s gloss on those sources, warrants a conclusion that departures should be reviewed using a deferential abuse of

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[168] Koon v. United States, 116 S. Ct. 2035, 2046 (1996) (quoting *Williams*, 503 U.S. at 205).

[169] *Williams*, 503 U.S. at 205 (citing U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (1991)) (emphasis added); *see also* notes 34–36 and accompanying text.

[170] *See supra* note 42 and accompanying text.

[171] *See infra* notes 220–27 and accompanying text.

[172] *Williams*, 503 U.S. at 205.

[173] *See id.* (holding that remand was required because "it is the prerogative of the district court, not the court of appeals, to determine, in the first instance, the sentence that should be imposed in light of certain factors properly considered under the Guidelines").

[174] This is, of course, the approach adopted by the courts of appeals prior to *Koon*. *See supra* notes 62–65 and accompanying text.

discretion standard. Although Congress wanted to preserve some discretion for sentencing judges, all indications are that it did so by insulating from appellate review the sentencing judge's selection of the point within the Guidelines sentencing range, as well as the sentencing judge's discretionary decision not to depart. The intensity of review of the permissibility of departure is a question answerable only by analysis of the institutional roles of departure and appellate review in the Guidelines system.

B. *Considerations of "Institutional Advantage" Favor Strong Departure Review*

The *Koon* Court's analysis also relied heavily on its perception of the "institutional advantages" district courts possess in determining whether a case is sufficiently unusual to be eligible for departure. This perception was driven by two considerations: first, the sentencing judge's departure decision involves "the consideration of unique factors that are 'little susceptible . . . of useful generalization'";[175] and second, the sentencing judge is in a better position than are appellate judges to evaluate whether a case is meaningfully atypical because of the sentencing judge's daily proximity to the facts of Guidelines cases.[176] The Court's reasoning is flawed on both counts. The departure determination was not designed to be as ad hoc as the Court suggests. The operative principles announced in appellate departure cases can provide meaningful guidance to sentencing judges in future cases. Indeed, developing principled guidance of this sort is a central purpose of Guidelines sentencing. Moreover, it is precisely the perspective provided by the appellate courts' distance from individual cases that enables them to provide principled guidance and promote greater consistency among individual sentencing judges.

1. *Determining Appellate Review Standards from Institutional Considerations: Narrow Facts vs. Law Declaration*

The proper standard of appellate review of a particular type of trial court determination sometimes is determined by "explicit statutory command" or by a "long history of appellate practice."[177] More often, however, the courts must determine standards of review in the absence of such direction. In performing

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[175] Koon v. United States, 116 S. Ct. 2035, 2047 (1996) (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 404 (1990)).

[176] *See id.* (pointing out that because the vast majority of Guidelines cases are never appealed, district judges are in a better position to compare the facts before them with those of other Guidelines cases).

[177] Pierce v. Underwood, 487 U.S. 552, 558 (1988).

this task, the Supreme Court has eschewed a comprehensive analytical framework in favor of a functional analysis which focuses on the relative institutional strengths and weaknesses of district and appellate courts in light of the issues presented.[178] Rather than focusing exclusively on characterizing the issue as one of law, fact, or trial court discretion, the Court weighs the various practical considerations counseling for and against deferential review.

This functional analysis necessarily varies due to its case-by-case nature, but has tended to turn largely on whether the issue before the appellate court is one which is generalizable in the sense that principles announced in appellate decisions meaningfully can guide future decisions in analogous settings. The absence of "generalizability" has been a major factor favoring deferential appellate review. As Professor Maurice Rosenberg stated:

> One of the "good" reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist [useful] generalization—at least, for the time being.[179]

Thus, where the question on appeal depends heavily on such factors as witness demeanor or credibility,[180] a party's state of mind,[181] or other matters not well

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[178] *See id.* at 559–60 (stating that standards of review turn "on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question") (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)). Although the Court adopted this functional analysis in determining the appropriate treatment of a mixed question of law and fact, it explained that the same considerations are applicable in choosing between de novo review and a more deferential abuse of discretion standard. *See id.* at 557–58.

[179] Rosenberg, *supra* note 128, at 662. He further explains:

> In the dialogue between the appellate judges and the trial judge, the former often seem to be saying: "You were there. We do not think we would have done what you did, but we were not present and we may be unaware of significant matters, for the record does not adequately convey to us all that went on at the trial. Therefore, we defer to you."

Id. at 663.

[180] *See, e.g.*, Patton v. Yount, 467 U.S. 1025, 1038 (1984) (applying deferential review standard to juror impartiality determinations because they turn largely on determinations of demeanor and credibility).

[181] *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 288–90 (1982) (applying clearly erroneous standard to review findings regarding the existence of defendant's discriminatory intent under Title VII).

represented on the record,[182] the Court has urged deferential review. In contrast, where independent appellate review would promote clarification of legal principles, the Court has held deference to be inappropriate.[183] Application of these principles and their implications for *Koon* may best be understood through a more detailed comparison and contrast of recent Supreme Court cases addressing standards of appellate review: *Pierce v. Underwood*[184] and *Cooter & Gell v. Hartmarx Corp.*,[185] in which the Court determined deferential review was appropriate, and *Ornelas v. United States*[186] and *Thompson v. Keohane*,[187] in which the Court held that independent review was required.

In *Pierce*, the Court held that the trial court's decision to award attorney's fees against the United States under the Equal Access to Justice Act ("EAJA")[188] should be reviewed for abuse of discretion. Several key principles animated this conclusion. First, the Court acknowledged that determining whether the government's litigation position was substantially justified for EAJA attorney's fees award purposes is, broadly categorized, an issue of litigation supervision. Such issues traditionally have been subject to deferential review.[189]

Second, *Pierce* emphasized that the district court was better positioned to determine whether the government's litigation posture was substantially justified

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[182] *See, e.g.*, *Pierce*, 487 U.S. at 560 (taking into account district court insights into litigation practices not apparent in the record as a factor favoring abuse of discretion review).

[183] *See infra* notes 191–209 and accompanying text.

[184] 487 U.S. 552 (1988).

[185] 496 U.S. 384 (1990).

[186] 116 S. Ct. 1657 (1996).

[187] 116 S. Ct. 457 (1995).

[188] The pertinent portions of the EAJA require courts to award attorney's fees to litigants prevailing against the United States in civil litigation unless there is a finding that the government's litigation position is "substantially justified." The relevant language provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, . . . incurred by that party in any civil action . . . , brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (1994).

[189] *See Pierce*, 487 U.S. at 558 n.1 ("It is especially common for issues involving what can broadly be labeled as 'supervision of litigation,' which is the sort of issue presented here, to be given abuse-of-discretion review."). *See generally supra* notes 58–60 and accompanying text (discussing abuse of discretion review in context of litigation supervision).

because of pre-trial exposure to evidence not necessarily reflected in the record.[190] The Court in *Pierce* concluded that the district judge's on-the-scene presence created a comparative advantage in evaluating whether the government's losing position was substantially justified.

In addition, the *Pierce* Court articulated the concern that EAJA attorney's fees determinations are "multifarious and novel" questions, not susceptible of useful generalization. This was the case due to the flexibility of the statutory "substantially justified" standard itself, which the Court equated with a test of "reasonable basis in both law and fact."[191] In other words, the EAJA attorney's fees determinations addressed in *Pierce* were not based on whether the government's litigation position satisfied a substantive statutory standard (that is, whether the government's position was "correct"), but on whether the government's position was "close enough." Questions of this sort do not lend themselves to precedent-based analysis. Finally, *Pierce* expressed the concern that de novo review of EAJA attorney's fees determinations would encourage satellite litigation, involving a pseudo-redetermination of the merits by the appellate court.[192]

The Court cited similar considerations in holding in *Cooter & Gell v. Hartmarx Corp.*[193] that Rule 11 sanctions[194] should be reviewed for abuse of discretion. The Rule 11 review question, like the EAJA question, is categorically one of litigation management, traditionally reviewed deferentially. The underlying legal standard was not one of "correctness," but one of reasonableness, which requires a fact-specific, comprehensive record

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[190] *See Pierce*, 487 U.S. at 560 ("By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government.").

Alternatively, the Court noted that even where the appellate court could gain access to all the relevant record evidence, de novo review would require it "to undertake the unaccustomed task of reviewing the entire record . . . to determine whether urging of the opposite merits determination was substantially justified." *Id.* In contrast, a full record review is not required to determine whether a particular departure factor is valid.

[191] *Id.* at 565, 566 n.2; *see also* H.R. CONF. REP. NO. 96-1434, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5003, 5011 (stating that "[t]he test of whether the Government position is substantially justified is essentially one of reasonableness in law and fact").

[192] *See Pierce*, 487 U.S. at 563 ("In addition to furthering the goals we have described, [abuse of discretion review] will implement our view that a 'request for attorney's fees should not result in a second major litigation.'") (citation omitted).

[193] 496 U.S. 384 (1990).

[194] *See* FED. R. CIV. P. 11(c) (authorizing sanctions for filing of pleadings not well-grounded in fact or warranted by existing law or its good faith extension, based on the filing attorney's reasonable inquiry).

review.[195] The nature of this review, which the Court compared to determinations of negligence, favors the district court because of its proximity to the facts.[196] Finally, the Court expressed some concern that de novo review of Rule 11 sanctions would spur inefficient satellite litigation.[197]

Ornelas and *Thompson* provide an interesting contrast. In *Ornelas v. United States*,[198] decided just two weeks before *Koon*, the Court held that de novo review is applicable to district court findings regarding both the existence of reasonable suspicion to stop and question citizens, and the existence of probable cause to make a warrantless search.[199] *Ornelas* arose from petitioners' attempts to suppress evidence of cocaine found in their car as a result of an investigatory stop which blossomed into a warrantless search of the car.[200] The district court found that the investigatory stop was adequately supported by reasonable suspicion,[201] and that the warrantless search was adequately supported by probable cause.[202] The United States Court of Appeals for the Seventh Circuit reviewed the district court's determinations of reasonable suspicion and probable cause under a deferential "clear error" standard.[203] The Seventh Circuit affirmed the district court's reasonable suspicion determination,

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[195] *See Cooter & Gell*, 496 U.S. at 401–02 ("For example, to determine whether an attorney's prefiling inquiry was reasonable, a court must consider all the circumstances of a case."). The Court further noted that the flexible reasonableness standard associated with application of Rule 11 was not well-suited to precedent-creating rule articulation. *See id.* at 405 ("An appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances [to avoid Rule 11 sanctions] is unlikely to establish clear guidelines for lower courts; nor will it clarify the underlying principles of law.").

[196] *See id.* at 402 ("Familiar with the issues and litigants, the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11.").

[197] *See id.* at 404 ("Such deference will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation.").

[198] 116 S. Ct. 1657 (1996).

[199] *See id.* at 1659.

[200] *See id.* at 1660.

[201] *See id.*; *see also* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (investigatory stop by police is permissible if supported by reasonable suspicion to believe that the person stopped is involved in criminal activity).

[202] *See Ornelas*, 116 S. Ct. at 1659; *see also* California v. Acevedo, 500 U.S. 565, 569–70 (1991) (stating that warrantless search of an automobile is permissible if based on probable cause).

[203] United States v. Ornelas-Ledesma, 16 F.3d 714, 719 (7th Cir. 1994), *vacated sub nom.*, Ornelas v. United States, 116 S. Ct. 1657 (1996).

and remanded for further factual findings on the probable cause determination.[204] The Supreme Court granted certiorari to resolve a conflict among the circuits as to the standard of review applied to reasonable suspicion and probable cause determinations.[205]

The Court, in an opinion by Chief Justice Rehnquist, held that reasonable suspicion and probable cause determinations should be reviewed de novo.[206] Justice Rehnquist conceded that both reasonable suspicion and probable cause are fluid, commonsense concepts that are "not readily, or even usefully, reduced to a neat set of legal rules."[207] He further conceded that these concepts derive their content from the particular facts unique to individual cases.[208] Yet the Court concluded in *Ornelas* that the fact-intensive reasonable suspicion and probable cause inquiries nevertheless should be subjected to de novo review. The central theme of the Court's analysis was that despite the fact-intensive nature of probable cause and reasonable suspicion questions, plenary appellate review aids in the development of the law in those areas. That is, the Court recognized that the elaboration of generally applicable constitutional norms could occur through the consideration of closely related fact situations.[209]

In addition to the *ability* to generalize from fact specific applications of Fourth Amendment principles, the *Ornelas* Court emphasized the *importance* of efforts to promote law development through such generalization. This law development furthers two important rule of law interests: consistency and fairness in application,[210] and stabilization and promotion of certainty in the

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[204] *See id.* at 719–22.

[205] *See Ornelas*, 116 S. Ct. at 1661. The Court noted that, in contrast to the deferential approach of the Seventh Circuit, the Second, Ninth and Eleventh Circuits had engaged in de novo review of lower court conclusions regarding the existence of reasonable suspicion and probable cause. *See id.* at 1661 n.4.

[206] *See id.* at 1659.

[207] *Id.* at 1661 (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).

[208] *See id.*

[209] The Court emphasized that "even where one case may not squarely control another one, the two decisions when viewed together may usefully add to the body of law on the subject." *Id.* at 1663. The Court cited several examples in which its earlier decisions involving probable cause or reasonable suspicion determinations served as guiding precedent for later cases. *Id.* at 1662 (noting that, among other examples, Carroll v. United States, 267 U.S. 132 (1925) influenced Brinegar v. United States, 338 U.S. 160 (1949); Florida v. Royer, 460 U.S. 491 (1983) influenced United States v. Sokolow, 490 U.S. 1 (1989); and United States v. Ross, 456 U.S. 798 (1982) influenced California v. Acevedo, 500 U.S. 565 (1991)).

[210] *See Ornelas*, 116 S. Ct. at 1662 (highlighting the necessity of treating similar fact patterns similarly).

law.[211]

In contrast to these advantages conferred by de novo review, the Court expressed the concern that exceedingly deferential review would permit the effective scope of the Fourth Amendment to turn on the idiosyncratic determinations of individual judges, creating the risk of varying results that "would be inconsistent with the idea of a unitary system of law."[212] It also noted that deferential review would undermine the appellate courts' crucial function of law declaration—the announcement and clarification of legal principles.[213]

The Court's reasoning in *Thompson v. Keohane*[214] was quite similar. In that case, the Court held that the presumption of correctness afforded state court factual determinations in federal habeas corpus proceedings[215] does not extend to conclusions regarding whether the defendant was "in custody" for *Miranda*[216] purposes.[217] Rather, the Court concluded that the "in custody" determination is a mixed question of law and fact requiring independent (non-deferential) review.[218] As the Court explained,

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[211] *See id.* (explaining that de novo review will help unify precedent and aid law enforcement officials in understanding what the law requires).

[212] *Id.*

[213] *See id.* ("Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify the legal principles.").

[214] 116 S. Ct. 457 (1995).

[215] *See* 28 U.S.C. § 2254(d) (1994).

[216] *See* Miranda v. Arizona, 384 U.S. 436, 498-99 (1966) (requiring suppression of confession obtained from custodial interrogation in the absence of warnings designed to inform the suspect of his Fifth Amendment privilege against self-incrimination).

[217] *See Thompson*, 116 S. Ct. at 462.

[218] *See id.* at 465. The procedural posture of *Thompson* was different from that in *Ornelas*. Because *Thompson* involved a collateral attack under the habeas corpus provisions, rather than a direct appeal, *Thompson* technically did not involve a choice between a clearly erroneous standard and a de novo standard, but rather a choice between independent review of the state court's "in custody" determination and affording that determination the presumption of correctness required under 28 U.S.C. § 2254(d) with respect to fact determinations. *See* 28 U.S.C. § 2254(d) (1994). However, many appellate courts have considered the independent review/presumption of correctness determination to be functionally equivalent to the de novo/clear error determination made in direct appeal cases. *See, e.g.*, United States v. Bethancourt, 65 F.3d 1074, 1078 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1032 (1996) (concluding that de novo review of determination of voluntariness of confession is compelled by Miller v. Fenton, 474 U.S. 104 (1985), a § 2254 independent review case); United States v. Robinson, 20 F.3d 320, 322 (8th Cir. 1994) (same); United States v. Romero, 897 F.2d 47, 52 (2d Cir. 1990) (same). The Supreme Court itself does not differentiate between independent review in habeas cases and de novo review in direct appeal

> Classifying "in custody" as a determination qualifying for independent review should serve legitimate law enforcement interests as effectively as it serves to insure protection of the right against self-incrimination. As our decisions bear out, the law declaration aspect of independent review potentially may guide police, unify precedent, and stabilize the law.[219]

Thus, in *Thompson*, as in *Ornelas*, the Court emphasized the necessity of independent appellate review to further case-by-case development of important legal principles.

In short, one canvassing recent Supreme Court decisions addressing standards of appellate review might view *Pierce* and *Cooter & Gell* as model cases for deferential review and *Ornelas* and *Thompson* as the models for non-deferential review. By relying on *Pierce* and *Cooter & Gell*, and completely ignoring *Ornelas* and *Thompson*, the *Koon* Court chose the wrong model. As the next section demonstrates, appellate departure case law both is capable of providing guidance to district courts and is necessary to promote the central purposes of the Guidelines. Thus, deferential abuse of discretion review of the permissibility of departure is inadvisable.

2. *Appellate Review and the Development of Departure Jurisprudence*

a. *Generalizability—The Possibility of Principled Departure Analysis*

A key to the *Koon* Court's analysis was its conclusion that because departure determinations are not susceptible of useful generalization, de novo review "is unlikely to establish clear guidelines for lower courts."[220] This characterization is demonstrably inaccurate. Pre-*Koon* Guidelines departure case law is replete with examples of the kind of appellate-driven jurisprudential development that *Koon* suggests is not possible. Take, for example, the treatment of defendant's restitution to the victim as a potential basis for downward departure.[221] The Guidelines are silent on the appropriateness of

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cases. *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 559–60 (1988) (citing a § 2254 case, *Miller*, as authority in direct appeal context).

[219] *Thompson*, 116 S. Ct. at 467.

[220] Koon v. United States, 116 S. Ct. 2035, 2047 (1996) (citation omitted).

[221] One could point to any number of other issues to demonstrate the role of appellate review in developing departure jurisprudence. I chose the restitution case law because it is commonly litigated, and the case law is well-developed.

departing on the basis of restitution as such.[222] However, many courts have looked to the language and structure of the Guidelines as a whole, and have concluded that the Commission included restitution as a factor courts should consider in deciding whether to grant a downward offense-level adjustment for the defendant's acceptance of responsibility.[223] Based on this analysis, most courts treat restitution as a factor that already has been taken into account by the Guidelines, and thus one that should not, in the ordinary case, be a basis for departure.[224] It can, however, be taken into account where it is present to a degree making the case atypical or unusual.[225]

These conclusions, which are based on interpretations of the language and purposes of relevant guidelines provisions, have been cited as having precedential value in later cases.[226] Even the *Koon* Court would acknowledge that this determination, which may be characterized as going to whether a sentencing judge may ever consider restitution in departing from the Guidelines, is a conclusion of law, providing controlling authority to district courts.[227] It is a more difficult question whether the more specific determination—deciding if the defendant's restitution in a particular case qualifies as extraordinary—similarly has precedential value. The answer, however, is the same. As in *Ornelas*, the consideration of related fact situations on a case-by-case basis permits the gradual accretion of generally operative principles that provide meaningful guidance to lower courts.

For example, the analysis of the United States Court of Appeals for the Fourth Circuit in *United States v. Hairston*[228] demonstrates that a number of relevant guiding principles have evolved through development of the restitution-based departure case law. The court noted that the amount of restitution as a percentage of the victim's loss has been deemed relevant to the departure

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[222] *See, e.g.*, United States v. Hairston, 96 F.3d 102, 107 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 956 (1997).

[223] *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 application note 1 (1997) (enumerating factors judge should consider in granting acceptance of responsibility adjustment, including "voluntary payment of restitution prior to adjudication of guilt").

[224] *See, e.g.*, United States v. Broderson, 67 F.3d 452, 458 (2d Cir. 1995) ("Ordinarily, payment of restitution is not an appropriate basis for downward departure under Section 5K2.0 because it is adequately taken into account by Guidelines Section 3E1.1 . . . .").

[225] *See, e.g.*, United States v. Garlich, 951 F.2d 161, 163–64 (8th Cir. 1991); United States v. Brewer, 899 F.2d 503, 509 (6th Cir. 1990).

[226] *See, e.g.*, *Hairston*, 96 F.3d at 107–08.

[227] *See* Koon v. United States, 116 S. Ct. 2035, 2047 (1996) ("The Government is quite correct that whether a factor is a permissible basis for departure under any circumstances is a question of law . . . .").

[228] 96 F.3d 102 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 956 (1997).

inquiry, with some courts rejecting even full restitution as a basis for departure.[229] It also noted the importance of the timing of the restitution[230] and the source of the funds.[231] Relying on these principles extracted from existing case law, the court concluded that the defendant's restitution in the amount of slightly less than one-half the victim's loss, made after her indictment, using money raised for her by friends and members of her church, was not sufficiently extraordinary to warrant downward departure, and that the sentencing judge had abused his discretion in concluding otherwise.[232]

In short, a sentencing judge faced with deciding whether a particular defendant's act of restitution is sufficiently atypical to authorize a departure is not without guidance. Although the judge's determination depends on the unique facts and circumstances of the case, it is meaningfully channeled by the principles announced in earlier cases involving broadly analogous facts. The *Koon* Court was wrong to characterize the district court's determinations about permissibility of departure as resistant to guidance from independent appellate review. The elaboration of generally applicable legal principles through appellate consideration of closely related fact situations occurs here much the same way as it does in the Fourth Amendment and *Miranda* Fifth Amendment contexts, recognized by the Court in *Ornelas* and *Thompson*, respectively.[233]

b. *Rule of Law Interests—The Importance of Principled Departure Analysis and the Role of Appellate Review in Shaping that Analysis*

In addition to evaluating amenability to rules or governing principles, the Court's standards of review jurisprudence has emphasized the extent to which

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[229] *See id.* at 108 (comparing, *inter alia*, United States v. Arjoon, 964 F.2d 167, 171 (2d Cir. 1992) (rejecting departure based on restitution of 50% of loss amount) and United States v. Carey, 895 F.2d 318, 322–24 (7th Cir. 1990) (rejecting departure based on restitution of 90% of loss amount) with United States v. Davis, 797 F. Supp. 672, 677 (N.D. Ind. 1992) (imposing departure based on restitution in excess of some estimates of loss) and United States v. Lieberman, 971 F.2d 989, 996 (3d Cir. 1992) (affirming departure where restitution was $34,000 in excess of loss)).

[230] *See Hairston*, 96 F.3d at 109 (comparing *Garlich*, 951 F.2d at 162–63 (finding significance in defendant's offer to make restitution prior to learning of FBI investigation) with United States v. Miller, 991 F.2d 552, 553 (9th Cir. 1993) (questioning whether restitution was truly "voluntary," given defendant's motive to settle civil lawsuit) and United States v. Bennett, 60 F.3d 902, 905 (1st Cir. 1995) (same)).

[231] *See Hairston*, 96 F.3d at 109 (citing United States v. Bolden, 889 F.2d 1336, 1340–41 (4th Cir. 1989) (holding that restitution made with borrowed money did not justify departure)).

[232] *See id.*

[233] *See supra* notes 198–209, 219 and accompanying text.

non-deferential review will serve important practical interests. For example, where constitutional principles are at stake, the Court has been unwilling to countenance deferential review.[234] On the other hand, the absence of "substantial consequences" associated with a particular type of lower court determination has worked in favor of deferential review.[235] Given what is at stake in determining the permissibility of a departure from the presumptive Guidelines sentence, the Court's approach suggests that such determinations warrant independent appellate review.

First, the nature and purposes of the Guidelines generally, and the departure provisions specifically, highlight the importance of promoting the development of guiding principles through appellate review. The sentencing reform movement which spurred Congress's adoption of the SRA was a reaction to the perception that the pre-Guidelines discretionary sentencing regime was, in some important sense, lawless.[236] The political and academic supporters of sentencing reform articulated a contrasting vision of a "rational" sentencing scheme, the key features of which were binding guidelines and appellate review. These two mechanisms were designed specifically to permit the creation of a body of legal sentencing principles, a jurisprudence of sentencing, that would constrain judicial decisionmaking.[237] As Judge Marvin Frankel explained:

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[234] *See, e.g.*, Bose Corp. v. Consumers Union, 466 U.S. 485, 514 (1985) (holding that the clearly erroneous standard of Rule 52(a) does not apply to findings of actual malice in defamation cases governed by New York Times v. Sullivan Co., 376 U.S. 254 (1964)). *See generally* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985) (discussing the role of appellate review of mixed questions of law and fact in the case-by-case development of constitutional principles).

The concern for the impact of appellate review on constitutional development underlying the constitutional fact review doctrine appears to have played a role in the Court's endorsement of non-deferential review in both *Ornelas v. United States*, 116 S. Ct. 1657, 1662 (1996) (emphasizing that deference to district judges would violate rule of law principles by making the scope of the Fourth Amendment turn on the conclusions of individual judges) and *Thompson v. Keohane*, 116 S. Ct. 457, 467 (1995) (emphasizing the importance of law declaration function of independent review in the *Miranda* self-incrimination context, and citing Monaghan, *supra*).

[235] *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 563 (1988) (explaining that where a particular class of district court decision typically produces substantial liability, "one might expect it to be reviewed more intensively" than the abuse of discretion standard the Court adopted in that case).

[236] *See, e.g.*, FRANKEL, *supra* note 27, at 5 ("[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.").

[237] *See id.* at 75–85.

> The contention that sentencing is not regulated by rules of "law" subject to appellate review is an argument for, not against, a system of appeals. The "common law" is, after all, a body of rules evolved through the process of reasoned decision of concrete cases, mainly by appellate courts. . . . One way to begin to temper the capricious unruliness of sentencing is to institute the right of appeal, so that appellate courts may proceed in their accustomed fashion to make law for this grave subject.[238]

He concluded that appellate review of sentences is "one step toward the rule of law in a quarter where lawless and unchecked power has reigned too long."[239]

Congress expressed similar views regarding the problems of discretionary sentencing, and the appropriate solution to those problems. The legislative history of the SRA emphasized the absence of a body of sentencing law as the underlying cause of unwarranted disparities in sentencing.[240] It also indicated that Congress intended the Guidelines to operate as the basis for an evolving law of federal sentencing, which would develop through the traditional exercise of appellate review.[241] It explained: "Appellate review of sentences is essential to assure that the guidelines are applied properly *and to provide case law development of the appropriate reasons for sentencing outside the guidelines.* This, in turn, will assist the Sentencing Commission in refining the sentencing guidelines as the need arises."[242]

In short, the essence of the Guidelines scheme is the creation and enforcement of a rule of law in sentencing. As the Senate Report language quoted above implies, the development of guiding principles is particularly important in the departure context, where the usual centripetal force of the Guidelines sentencing ranges does not operate. That is why Congress tightly constrained the sentencing judge's departure role by a statutory directive requiring, as a prerequisite to lawful departure, both the presence of unusual circumstances not adequately considered in the existing guidelines and a determination that those circumstances warrant a sentence different from that authorized by the Guidelines.[243] The *Koon* Court's assertion that the decision to

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[238] *Id.* at 84.

[239] *Id.* at 85.

[240] *See, e.g.*, S. REP. NO. 98-225, at 41 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3224 ("The absence of a comprehensive Federal sentencing law and of statutory guidance on how to select the appropriate sentencing option creates inevitable disparity in the sentences which courts impose on similarly situated defendants.").

[241] *See id.* at 150–51.

[242] *Id.* at 151 (emphasis added).

[243] *See* 18 U.S.C. § 3553(b) (1994); *see also supra* notes 18–22 and accompanying text.

depart "embodies the traditional exercise of discretion by a sentencing court" is thus highly misleading—departure is discretionary in the sense that the sentencing judge is never, regardless of the facts, *required* to depart.[244] However, the choice to depart is not discretionary in that the judge is not authorized to depart without making the two determinations outlined above, with appropriate reasons, subject to appeal. This structure was designed to permit the development of a jurisprudence of departure—principles of law to guide sentencing judges in future potential departure cases.

Independent appellate review of the validity of the sentencing judge's determination fosters the articulation and development of generally applicable principles of departure jurisprudence.[245] Highly deferential review, by definition, does not. Such review presumes the essentially ad hoc, fact-bound nature of the question presented.[246]

Independent appellate review of the validity of departure factors also serves important rule of law interests by controlling the exercise of departure authority by district judges. Appellate review serves as an important check on the inappropriate use of departure authority and thus furthers the central goal of the SRA—the reduction in unwarranted sentencing disparities.[247]

Viewed in this light, it is apparent that the *Koon* Court's reliance on *Pierce* and *Cooter & Gell* was misplaced. Each of the critical factors pointing toward an abuse of discretion standard in those cases is absent from departure review. Departure is not a litigation management determination, based in part on off-

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[244] Koon v. United States, 116 S. Ct. 2035, 2046 (1996). That is, the discretionary decision not to depart is *completely* discretionary in that such a decision is not subject to appeal. *See supra* note 36 and accompanying text.

[245] *See supra* Part III.B.2.a.

[246] *See, e.g.*, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990) ("An appellate court's review of whether a legal position was reasonable or plausible enough under the circumstances is unlikely to establish clear guidelines for lower courts; nor will it clarify the underlying principles of law."); *see also* Ornelas v. United States, 116 S. Ct. 1657, 1662 (1996) (explaining that highly deferential review is inconsistent with development of legal principles).

[247] This highlights a central argument in *Ornelas*, which emphasized that de novo review of probable cause and reasonable suspicion determinations was necessary in part to promote equal treatment among similarly situated defendants. *See Ornelas*, 116 S. Ct. at 1662 (stating that deferential review would permit different conclusions as to the scope of the Fourth Amendment by different trial judges, a result "inconsistent with the idea of a unitary system of law"). Although Congress recognized the utility of avoiding a completely mechanical sentencing structure, it also recognized that excessively frequent resort to departures, or use of departures in inappropriate circumstances, would introduce into federal sentencing the unwarranted disparities the Guidelines were designed to correct. *See* S. REP. No. 98-225, at 150–51 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3333–34 (describing reasoning for placing limits on departure).

the-record factors, which risks spawning satellite litigation.[248] Nor is it, contrary to the Court's assertion, the type of "multifarious and novel" determination to which Professor Rosenberg referred,[249] that can be reviewed only deferentially. Both *Pierce* and *Cooter & Gell* involved amorphous underlying legal standards, making independent review difficult.[250] Those cases might be analogous to the issue in *Koon* if the SRA permitted sentencing judges to depart from the Guidelines upon a determination that such a departure would be "reasonable" in light of relevant guidelines provisions. This is, of course, not how the departure authority is framed. Rather, as the Court explained in *Williams*, the validity of departure grounds are questions of the correct application of the Guidelines, which involve analyses of the language, structure and purpose of the Guidelines.[251] Such analyses, which closely resemble statutory interpretation, implicate the types of rule of law interests the Court found in *Ornelas* and *Thompson* to dictate independent review.

In addition to its misleading characterization of the nature of the departure determination, *Koon* emphasized the special role of the sentencing judge aiding the Commission's task of reviewing and revising the Guidelines, and contended that this role would be facilitated by deferential review of departures.[252] This argument is unpersuasive. The Commission has not been deprived of information arising from the reactions of sentencing judges to individual cases as a result of the prevailing *Diaz-Villafane* standard. Indeed, precisely the opposite is true. There is no evidence that sentencing judges have been discouraged from departing in appropriate cases by the prospect of de novo review; they also quite often explain why they feel constrained to refrain from departing under certain circumstances.[253] Information problems are more likely

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[248] *See supra* notes 188–97 and accompanying text.

[249] *See supra* notes 179, 191 and accompanying text.

[250] *See supra* note 188 and accompanying text (describing EAJA determination as whether the government's litigation position was "substantially justified"); note 195 and accompanying text (describing Rule 11 determination as one of "reasonable inquiry").

[251] *See supra* notes 42–45 and accompanying text.

[252] *See* Koon v. United States, 116 S. Ct. 2035, 2047 (1996) (explaining that non-deferential review of sentencing judges' assessments of the unusualness of particular cases "'would risk depriving the Sentencing Commission of an important source of information, namely, the reactions of the trial judge to the fact-specific circumstances of the case'") (quoting United States v. Rivera, 994 F.2d 942, 951 (1st Cir. 1993)).

[253] *See, e.g.*, United States v. Lowden, 905 F.2d 1448, 1449 (10th Cir. 1990) (noting that the district court believed "it could not base a departure on the prevalence of alcohol abuse on Indian reservations"); United States v. Cheape, 889 F.2d 477, 479–80 (3d Cir. 1989) (acknowledging that the district court concluded that it was precluded from departing based on mitigating factors).

to arise if appellate courts adopt an exceedingly deferential approach to departure review. The Commission typically has closely scrutinized appellate opinions in analyzing potential amendments relating to departure practices.[254] If simple holdings to the effect that "the district court did not abuse its discretion" become commonplace, circuit-wide legal principles will not coalesce, and the Commission will have less to work with than under the pre-*Koon* regime.

In short, independent appellate review of departure decisions furthers a core function of the Guidelines by promoting the development of a jurisprudence of departure, a body of principles to guide sentencing judges in deciding whether the circumstances of a given case might warrant departure. In addition, independent appellate review furthers the Guidelines' goal of reducing unwarranted sentencing disparities by serving as a check on inappropriate exercises of sentencing judge discretion. The dicta in *Koon* emphasizing the discretionary nature of district court departure decisions and the limited scope of appellate departure review is inconsistent with the structure, nature and purposes of departure and appellate review under the Guidelines.

IV. REACTING TO *KOON*—THE NECESSITY OF THOUGHTFUL APPELLATE RESPONSE

I argued in the preceding section that significant portions of the Court's analysis in *Koon* were flawed. Neither the Court's arguments from 18 U.S.C. § 3742 and congressional intent, nor the Court's institutional competence argument, supports adoption of an abuse of discretion standard for appellate

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The Court's argument in *Koon* also ignores the fact that sentencing judges communicate their views about particular guidelines provisions in ways other than their judicial decisions. Correspondence to the Commission and interaction with Commissioners and staff at workshops and Sentencing Institutes is a major source of information for the Commission.

254 The Commission often has amended the Guidelines to address particular appellate decisions, particularly where circuit splits have arisen. Some examples include Commission amendment 466, inserting policy statement 5H1.12, U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 (1997) (prohibiting downward departure on the basis of lack of guidance as a youth and similar circumstances) (*cf.* United States v. Floyd, 945 F.2d 1096, 1099–102 (9th Cir. 1991) ("youthful lack of guidance" is a mitigating circumstance justifying departure), *overruled on other grounds by* United States v. Atkinson, 990 F.2d 501 (9th Cir. 1993)); amendment 486 to the application notes to § 2D1.1, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 application note 15 (1997) (providing for a downward departure for certain types of drug sentencing manipulation or sentencing entrapment) (*cf.* United States v. Williams, 954 F.2d 668, 672 (11th Cir. 1992) (rejecting as a matter of law defendant's sentencing entrapment theory)); amendment 487 to the commentary of § 2D1.1, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(D) (1997) (stating that the term "cocaine base" as used in the Drug Quantity Table means "crack") (*cf.* United States v. Jackson, 968 F.2d 158, 162 (2d Cir. 1992) (stating that cocaine base is not synonymous with crack)).

review of departures. Moreover, the Court's dicta extolling departure as a manifestation of the individual sentencing judge's residual discretion under the Guidelines is highly misleading. At the margins, these errors are potentially damaging to central purposes of the Guidelines.[255] However, the extent of this damage (and, to a certain extent, the force of my critique in section III) may be blunted by the ambiguity inherent in that standard, and the lack of clarity associated with the Court's analysis that I criticized in section II. That is, because one could reasonably interpret *Koon*'s abuse of discretion standard to encompass much of the pre-*Koon* appellate review, it may effect little change (and therefore impose little damage). It all depends on how the courts of appeals apply the standard. This section briefly canvasses the appellate reactions to *Koon* and offers some guidance to the appellate courts in performing their role in the Guidelines departure scheme after *Koon*.

A. *Revolutionary Change, or Same Old, Same Old?*

The early commentary on *Koon* was remarkably mixed. Depending on one's point of view, *Koon* represented (1) a momentous change in Guidelines jurisprudence;[256] (2) an inconsequential tinkering with the process of departure review;[257] or (3) an enigma, with effects that could not be readily determined.[258] How the appellate courts characterize *Koon* as changing or not

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[255] I emphasize that this damage is at the margins, because the vast majority of Guidelines cases are unlikely to be affected by *Koon*. *See, e.g.*, UNITED STATES SENTENCING COMMISSION, 1995 ANNUAL REPORT 89 tbl.31 (showing that departures other than those for substantial assistance to the authorities under § 5K1.1 accounted for less than 10% of Guidelines cases in fiscal year 1995).

[256] *See, e.g.*, United States v. Horton, 98 F.3d 313, 321 (7th Cir. 1996) (Evans, J., dissenting) (claiming that *Koon* "greatly alters the landscape" of appellate departure review, and constitutes a "monumental change" which "casts a pall over all of our earlier departure jurisprudence"); Abraham L. Clott, *An Assistant Public Defender Responds to* Koon, 9 Fed. Sent. Rep. (Vera Inst. of Justice) 25, 25 (1996) (stating that "[o]nly the most plainly illegal departures should fail" under the deferential standard adopted in *Koon*); Paul J. Hofer et al., *Departure Rates and Reasons After* Koon v. U.S., 9 Fed. Sent. Rep. (Vera Inst. of Justice) 284, 284 (1997) (noting that *Koon* "appeared to be the most important development in the area of departures since the implementation of the sentencing guidelines").

[257] *See, e.g.*, Kate Stith, *The Hegemony of the Sentencing Commission*, 9 Fed. Sent. Rep. (Vera Inst. of Justice) 14, 14 (1996) (arguing that "a thorough and candid assessment of *Koon* requires the conclusion that it has not changed matters significantly, and perhaps not at all"); *see also* United States v. Dutchie, No. 95-4052, 1996 U.S. App. LEXIS 17524, at *10 (10th Cir. July 17, 1996) (concluding that *Koon* does not alter the three-tiered departure review process previously applied by most appellate courts).

[258] *See, e.g.*, Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence After* Koon, 9 Fed. Sent. Rep. (Vera Inst. of Justice) 19, 19 (1996) (explaining that "it is

changing departure review is, however, less important than how they apply it. An examination of departure review practice after *Koon* reveals contrasting approaches to applying the teachings of that case.

Some appellate courts appear to have taken to heart the language emphasizing sentencing judge discretion and the need for appellate deference. Take, for example, *United States v. Rioux*.[259] In *Rioux*, an elected local official was convicted of several offenses involving extortion under color of official right. The sentencing judge imposed a substantial downward departure, based on the defendant's medical condition and past history of charitable deeds.[260] The United States Court of Appeals for the Second Circuit provided some indication of the nature and intensity of its review by stating at the outset that it would "review the district court's decision to depart from the applicable guideline sentencing range *only* for an abuse of discretion."[261] It then proceeded to find no abuse of discretion after a perfunctory discussion.[262]

That court engaged in a similar approach in *United States v. Galante*.[263] In that case, the court affirmed a downward departure from a GSR of forty-six to fifty-seven months to a sentence of probation (with home detention conditions),[264] based on the sentencing judge's determination that the

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virtually impossible to predict the practical effect of *Koon* on the daily work of the lower federal courts").

[259] 97 F.3d 648 (2d Cir. 1996).

[260] *See id.* at 662–63.

[261] *Id.* (emphasis added).

[262] The entire discussion in support of the departure was as follows:

> The district court did not abuse its discretion when it concluded that Rioux's case differed significantly from the heartland of guidelines cases. Rioux had a kidney transplant over 20 years ago, and his new kidney is diseased. Although his kidney function remains stable, he must receive regular blood tests and prescription medicines. As a complication of the kidney medications, Rioux contracted a bone disease requiring a double hip replacement. Although the replacement was successful, it does require monitoring. While many of Rioux's public acts of charity are not worthy of commendation, he unquestionably has participated to a large degree in legitimate fund raising efforts. Of particular moment are Rioux's efforts to raise money for the Kidney Foundation.
>
> It was not an abuse of discretion for the district court to conclude that, in combination, Rioux's medical condition and charitable and civic good deeds warranted a downward departure.

Id. at 663.

[263] 111 F.3d 1029 (2d Cir. 1997).

[264] *See id.* at 1032.

defendant's family circumstances were extraordinary.[265] The court emphasized its extreme deference to the district court on several occasions, characterizing the central question in the case—whether the family hardship was sufficiently exceptional to take the case out of the heartland—as a "subjective" question, "resting in the eye of the beholder," with the sentencing judge serving as the requisite beholder.[266]

A similarly expansive view of the impact of *Koon* is found in the Ninth Circuit's en banc decision in *United States v. Sablan*,[267] in which the court affirmed an upward departure that was based, in part, on the need to deter similar conduct in the relevant geographic area.[268] Not only did the court uphold the validity of the departure on the basis of very limited discussion,[269] it held that earlier circuit case law requiring sentencing judges to justify the extent of individual departures through analogy to existing guidelines provisions was no longer good law after *Koon*, a clear over-reading of that case, which did not purport to change the level of deference accorded the review of departure degree.[270]

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[265] *See id.* at 1031. The defendant was married, with two children, ages eight and nine, and had a disabled father. Both Galante and his wife worked, and there was evidence that the family would be devastated financially were Galante to be imprisoned. *See id.* at 1032.

[266] *Id.* at 1032–34. The court also stated that the test for whether the district judge abuses her discretion is "whether the circumstances relied upon to justify a downward departure are so far removed from those found exceptional in existing case law that the sentencing court may be said to be acting outside permissible limits." *Id.* at 1036.

[267] 114 F.3d 913 (9th Cir. 1997) (en banc).

[268] *See id.* at 918. The defendant was given a live hand grenade by a friend, and instructed to throw it into a nearby police headquarters, in order to create a diversion to facilitate a robbery. *See id.* at 914. Instead, the defendant instead tossed the grenade into a Post Office parking lot adjacent to the police building, where it exploded, injuring several bystanders and causing damage to the Post Office and nearby automobiles. *See id.* Sablan entered a plea of guilty to maliciously damaging a Post Office with an explosive, in violation of a federal statute. *See id.* at 914–15.

The sentencing judge departed upward from the applicable GSR, citing significant physical injury, *see* U.S. SENTENCING GUIDELINES MANUAL § 5K2.2 (1997), property damage, *see id.* § 5K2.5, and the need for deterrence in light of the fact that Sablan's partner was in possession of additional grenades. *See Sablan*, 114 F.3d at 917–18.

[269] *See Sablan*, 114 F.3d at 917. The dissent convincingly criticized the *Sablan* majority for failing adequately to consider the structure and theory of the relevant guidelines and the Guidelines as a whole in upholding deterrence as a ground for departure. *See id.* at 921 (Tashima, J., dissenting).

[270] Again, the dissent argued convincingly that under *United States v. Lira-Barraza*, 897 F.2d 981 (9th Cir. 1990), degree of departure already was reviewed under a deferential standard left unchanged by *Koon*. *See Sablan*, 114 F.3d at 919–20; *see also* United States v.

In contrast, analysis of other appellate cases suggests a business-as-usual approach to *Koon*. For example, a series of post-*Koon* cases from the Fourth Circuit reveal a departure review process which does not appear to differ materially from pre-*Koon* practice. In *United States v. Weinberger*,[271] the court rejected the sentencing judge's reliance on a civil forfeiture judgment in excess of the amount owed the government as a basis for downward departure.[272] Citing section 5E1.4 of the Guidelines, the court concluded that the Commission "considered forfeiture when creating the guideline ranges for terms of imprisonment," implicitly rejecting that as a pertinent factor in determining the proper sentence.[273] Consequently, it treated reliance on forfeiture as an "error of law," which is, "by definition," an abuse of discretion.[274]

The Fourth Circuit applied a similar approach to departure review in *United States v. Hairston*,[275] in rejecting a downward departure based on the defendant's "extraordinary restitution" to the victim of her embezzlement scheme.[276] Relying on prior case law and the structure and purposes of the relevant guidelines provisions, it held that the timing, motive and source of money for the restitution payment, in light of existing appellate case law, precluded the sentencing judge from permissibly finding that the defendant's restitution was "extraordinary."[277]

Cali, 87 F.3d 571, 580–81 (1st Cir. 1996) (noting that *Koon* did not change existing case law regarding appellate review of extent of departure).

271 91 F.3d 642 (4th Cir. 1996).

272 *See id.* at 645.

273 *Id.* (quoting United States v. Shirk, 981 F.2d 1382, 1397 (3d Cir. 1992)). Section 5E1.4 provides: "Forfeiture is to be imposed upon a convicted defendant as provided by statute." U.S. SENTENCING GUIDELINES MANUAL § 5E1.4 (1997).

274 *Weinberger*, 91 F.3d at 645 (citing Koon v. United States, 116 S. Ct. 2035, 2046–48 (1996)).

275 96 F.3d 102 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 956 (1997); *see supra* notes 228–32 and accompanying text (discussing *Hairston*).

276 *Hairston*, 96 F.3d at 104.

277 *Id.* at 108–09. It concluded:

> Accordingly, although we defer to the district court's greater experience, and although we recognize that the district court sees many more guidelines cases than appear in published opinions, because the circumstances of the restitution in this case are so far removed from those found exceptional in existing caselaw, we hold that the district court abused its discretion in finding Hairston's restitution provided a proper basis for departing from the Guidelines.

Id. (citation omitted); *see also supra* notes 222–32 and accompanying text.

Finally, in *United States v. Rybicki*,[278] the same court reversed as an abuse of discretion a departure based in part on the defendant's status as a law enforcement officer, which, according to the sentencing judge, made his incarceration "more onerous" than that of other offenders.[279] Noting that the sentencing judge failed to identify any circumstances (aside from his status as a law enforcement official) which would cause the defendant to suffer disproportionate punishment, it inferred from the Guidelines a lack of intent on the part of the Commission "to shield law enforcement officers as a group from the otherwise universally applicable effects of incarceration"[280] and characterized the sentencing judge's departure as a "legal error."[281]

B. *Unpacking Departure Review—What Is to Be Done?*

While there is legitimate ground for disagreement about the precise scope of appellate departure review in light of *Koon*, I would argue that the approach embodied in the Fourth Circuit cases, while fundamentally faithful to the strictures of *Koon*, is more consistent with the scheme envisioned by Congress than is the reflexively deferential approach represented by *Rioux*, *Galante*, and *Sablan*.[282] The former appropriately acknowledged the legal component wrapped inside the abuse of discretion standard. In most departure cases, determining whether the Commission has adequately considered a particular factor requires a close reading of the language, structure and purposes of the relevant guideline and sometimes of the Guidelines as a whole, an analysis which contains a substantial legal component. The same is true with respect to whether a particular factor, even if not adequately considered, warrants a sentence outside the Guidelines range. Therefore, appellate courts usually need not defer to the sentencing judge's determination that a particular factor or set of factors is meaningfully atypical for departure purposes.[283] If the courts of

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[278] 96 F.3d 754 (4th Cir. 1996).

[279] *Id.* at 758–59.

[280] *Id.* at 759.

[281] *Id.*

[282] In Part III, *supra*, I assumed that the abuse of discretion standard in *Koon* was substantially more deferential than the previously prevailing standard, and criticized the opinion on that basis. However, *Koon* is not entirely clear on this point. *See supra* Part II.C. In light of this ambiguity, it is appropriate, in my view, for appellate courts to interpret *Koon* to permit non-deferential review of the validity of sentencing judges' articulated grounds for departure.

[283] The only possible exception is the so-called "encouraged departure," *see supra* notes 71–74 and accompanying text, in which the Commission already has identified a factor which it acknowledges is not adequately accounted for in the relevant guidelines, and concluded that

appeals keep this in mind, and are careful to review independently those predominantly legal aspects of the departure determination, they can continue to serve the crucial functions that Congress intended.

In contrast, the reflexively deferential cases provide no guidance at all to sentencing judges in future cases. For example, the *Rioux* court did not discuss what makes Rioux's medical condition or charitable deeds "extraordinary" for Guidelines sentencing purposes. The court did not articulate principles regarding the future application of the relevant guidelines provisions, sections 5H1.4 and 5H1.11. This opinion gives the impression that departure review is purely ad hoc. Such review does not further Congress's goal of promoting a jurisprudence of federal sentencing, and to that extent is subject to condemnation.[284]

V. CONCLUSION

Appellate review of departures is a central component to the proper function of the Guidelines system conceived by Congress in the Sentencing Reform Act. The Court's opinion in *Koon* is a potential impediment to this function because some of the Court's language overemphasizes the discretion retained by individual sentencing judges to depart from the applicable Guidelines sentence and because the abuse of discretion standard embraced by the Court could be applied in such a way as to result in virtual abdication of the important departure control and law declaration functions of the courts of appeals.

It is important that the courts of appeals implementing *Koon* understand its limitations, despite the tendency to view the abuse of discretion standard as providing for "hands-off" review. Those courts still have the obligation to evaluate departures in light of the language, structure and purpose of individual guidelines and the Guidelines as a whole, and exercise their statutory authority to reject, in appropriate cases, departures that are inconsistent with the Guidelines. While *Koon* should serve as a reminder to appellate courts of their statutory obligation not to overstep their proper role and engage in appellate fact-finding, it need not and should not be viewed as fundamentally altering the relationship between sentencing judges and appellate courts with respect to decisions to depart from the Guidelines.

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the factor may warrant a departure. Here, the Commission already has made the interpretive decisions, and the sentencing judge is making findings in accordance with this pre-determined interpretation of the relevant guidelines. Such encouraged departures operate much like offense-level adjustment which the legislative history of the due deference language indicates should be reviewed at least somewhat deferentially. *See supra* notes 150–58 and accompanying text.

284 *See supra* notes 220–46 and accompanying text.